92-1532 (1)

Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1992

MARITIME OVERSEAS CORP.
AND ATLANTIA TANKER CORP.,

Petitioners,

v.

HAE WOO YOUN,

Respondent.

Petition For Writ Of Certiorari
To The Louisiana Court Of Appeal
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do the Supremacy and Equal Protection Clauses of the United States Constitution prohibit a state from discriminating against parties defending claims arising under federal admiralty law by denying them a right to a jury trial when defendants faced with similar state law claims are guaranteed jury trial rights?

2. Does substantive federal admiralty law require that some percentage of fault be assigned to a seaman who admits that he was in charge of the procedure that injured him, he was aware of a safer alternative, and chose not to use the safer alternative?

LIST OF PARTIES

The following are the parties to this proceeding:

Hae Woo Youn, Plaintiff-Respondent

*Maritime Overseas Corporation, Defendant-Petitioner

*Atlantia Tanker Corporation, Defendant-Petitioner

Assuranceforengen Gard, Defendant

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* Pursuant to Supreme Court Rule 29.1, Petitioner, Maritime Overseas Corporation states that it has no parent company or nonwholly owned subsidiaries. Petitioner, Atlantia Tanker Corporation is part of the group of companies which comprise the Overseas Shipholding Group, Inc., 1114 Avenue of the Americas, New York, New York, 10036

RULE 29.4(c) NOTIFICATION

Since the constitutionality of a state statute is drawn into question, 28 U.S.C. § 2403(b) may be applicable. Therefore, the attorney general of the state of Louisiana will be served with a copy of this Petition.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

RULE 29.4(c) NOTIFICATION iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

DECISIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 3

1. La. Code Civ. Proc. art. 1732 3

2. U.S. Const. art. VI, cl. 2 4

3. U.S. Const. amend. XIV, § 1 4

STATEMENT OF CASE 4

REASONS FOR GRANTING THE WRIT 6

I. Article 1732(6) Violates the Supremacy and Equal Protection Clauses Because It Singles Out Defendants Faced With Federal Admiralty Law Claims and Denies Them the Jury Trial Right Available to Defendants Faced With Similar State Law Claims 6

A. Louisiana Has Singled Out Defendants in Federal Admiralty Cases and Has Denied Them the Right to Trial by Jury 7

B. This Court Has Long Recognized That State Courts Adjudicating Federal Rights Must Apply Procedural Rules Which Are Neutral and Do Not Discriminate Against Federal Causes of Action 8

TABLE OF CONTENTS – Continued

Page

C. An Analogy to the Federal Admiralty Election Cannot Justify the Louisiana Scheme .. 9

D. Review Here Is Essential to Protect Petitioners' Federal Rights 11

II. The Louisiana Courts Misapplied Substantive Federal Admiralty Law in Assessing 100% Liability Against MOC and Atlantia 13

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES:

Alverez v. J. Ray McDermott & Co., 674 F.2d 1037 (5th Cir. 1982) 14

American Export Lines, Inc. v. Alvez, 446 U.S. 274 (1980) 2

Cambridge Corner Corp. v. Menard, 525 So. 2d 527 (La. 1988) 7

Ceja v. Mike Hooks, Inc., 690 F.2d 1191 (5th Cir. 1982) 14

Champagne v. American S. Ins. Co., 295 So. 2d 437 (La. 1974) 7

Garrett v. Moore-McCormack Co., 317 U.S. 239 (1942) 13

Guillory v. State Farm Mut. Auto. Ins. Co., 509 So. 2d 853 (La. Ct. App. 1987) 7

Howlett v. Rose, 496 U.S. 356 (1990) 9

Joyce v. Atlantic Richfield Co., 651 F.2d 676 (10th Cir. 1981) 14

Linton v. Great Lakes Dredge & Dock Co., 964 F.2d 1480 (5th Cir.), *cert. denied*, 113 S. Ct. 467 (1992) 12

McAllister v. Magnolia Petroleum Co., 357 U.S. 221 (1958) 13

McKnett v. St. Louis & S. F. Ry., 292 U.S. 230 (1934) 8

Miles v. Illinois Cent. R.R., 315 U.S. 698 (1942) 8, 9

Missouri ex rel. Southern Ry. Co. v. Mayfield, 340 U.S. 1 (1950) 8, 9

TABLE OF AUTHORITIES – Continued

Page

Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986) 13

Parker v. Rowan Cos., 599 So. 2d 296 (La.), *cert. denied*, 113 S. Ct. 203 (1992) 7, 9, 10, 12, 13

Rachal v. Ingram Corp., 795 F.2d 1210 (5th Cir. 1986) 10

Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949) 11

Robinson v. Zapata Corp., 664 F.2d 45 (5th Cir. 1981) .14, 15

Thezan v. Maritime Overseas Corp., 708 F.2d 175 (5th Cir. 1983), *cert. denied*, 464 U.S. 1050 (1984) 14

Youn v. Maritime Overseas Corp., 559 So. 2d 1367 (La. 1990) 2

Youn v. Maritime Overseas Corp., 605 So. 2d 187 (La. Ct. App.), *cert. granted*, 609 So. 2d 239 (La.), *cert. denied*, 609 So. 2d 240 (La. 1992)..... 1

CONSTITUTION:

U.S. Const. amend. XIV, § 1 4

U.S. Const. art. III, § 2 10

U.S. Const. art. VI, cl. 2 4

STATUTES:

28 U.S.C. § 1333.....5, 13

28 U.S.C. § 1257.....3, 11

28 U.S.C. § 2101(c) 2

46 U.S.C. § 688..... 5

TABLE OF AUTHORITIES – Continued

Page

45 U.S.C. § 51 *et seq.* 8

La. Code Civ. Proc. art. 1731 7

La. Code Civ. Proc. art. 1732 .... 3, 5, 6, 7, 9, 10, 13, 16

RULES:

Supreme Court Rule 10.1(b), (c) 3

Supreme Court Rule 13.1 3

MISCELLANEOUS AUTHORITIES:

14 Charles A. Wright et al., *Federal Practice & Procedure* § 3672, at 442 (2d ed. 1985) 13

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DECISIONS BELOW

The decision of the Louisiana Court of Appeal for the Fifth Circuit is reported at 605 So. 2d 187 (La. Ct. App. 1992) and reproduced in Appendix A. (App. 1a-52a)

The Louisiana Supreme Court denied the writ application filed by Maritime Overseas Corporation (MOC) and Atlantia Tanker Corporation (Atlantia) on December 21, 1992. *See* 609 So. 2d 240 (La. 1992). However, the Louisiana Supreme Court granted Youn's writ application concerning other issues, and oral argument is set for April 19, 1993. *See* 609 So. 2d 239 (La. 1992). The rulings

on these writ applications and the notice of oral argument are reproduced in Appendix B. (App. 53a-59a)[1]

Other pertinent rulings in the case include the trial court's order granting Youn's motion to strike the jury request. From that order, Atlantia sought supervisory writs with the state court of appeal and state supreme court, but the writs were denied. *See* 559 So. 2d 1367, 1367-68 (La. 1990). The trial court's order and the writ denials by the court of appeal and the supreme court are reproduced in Appendix C. (App. 60a-70a) The case was subsequently tried without a jury, and the trial court's order and opinion are reproduced in Appendix D. (App. 71a-83a)

JURISDICTION

On December 21, 1992, the Louisiana Supreme Court denied MOC and Atlantia's writ application, which sought review of the issues raised herein. Therefore, this petition is filed timely pursuant to 28 U.S.C. § 2101(c) and

[1] Youn has asserted that the state supreme court's denial of MOC and Atlantia's writ application makes the issues raised herein final. MOC and Atlantia have not agreed with that position. The Louisiana Supreme Court has declined to address the finality issue, however, and, in an abundance of caution, MOC and Atlantia are submitting this writ application within 90 days from the date the state supreme court declined to review the issues raised here. *See American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 279 n.7 (1980) (finality of separate maritime claim not affected by nonfinality of other claim). MOC and Atlantia will notify this Court as soon as the state supreme court finally resolves all the other issues in the case.

Supreme Court Rule 13.1. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257 and Supreme Court Rule 10.1(b) and (c).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. La. Code Civ. Proc. art. 1732:

A trial by jury shall not be available in:

(1) A suit where the amount of no individual petitioner's cause of action exceeds twenty thousand dollars exclusive of interest and costs.

(2) A suit on an unconditional obligation to pay a specific sum of money, unless the defense thereto is forgery, fraud, error, want, or failure of consideration.

(3) A summary, executory, probate, partition, mandamus, habeas corpus, quo warranto, injunction, concursus, worker's compensation, emancipation, tutorship, interdiction, curatorship, legitimacy, filiation, annulment of marriage, or divorce proceeding.

(4) A proceeding to determine custody, visitation, alimony, or child support.

(5) A proceeding to review an action by an administrative or municipal body.

(6) A suit on an admiralty or general maritime claim under federal law that is brought in state court under a federal "saving to

suitors" clause, if the plaintiff has designated that suit as an admiralty or general maritime claim.

(7) All cases where a jury trial is specifically denied by law.

2. U.S. Const. art. VI, cl. 2:

> This Constitution, and the Laws of the United States shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

3. U.S. Const. amend. XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal the protection of the laws.

STATEMENT OF CASE

Hae Woo Youn, a citizen of the Republic of Korea, filed this action in Louisiana state trial court on July 10, 1989, claiming damages for an injury he sustained while working as the boatswain ("bosun") aboard the M/T ATLANTIA, a Liberian oil tanker owned by defendant

Atlantia Tanker Corporation ("Atlantia").[2] Youn's petition alleged that his case was "under the Jones Act, 46 U.S.C. § 688, and the General Maritime Law, brought in this Honorable Court under the Saving to Suitor's Clause, 28 U.S.C. § 1333." Youn did not invoke the benefits of article 1732(6) of the Louisiana Code of Civil Procedure. (*See* App. 84a-89a)

On October 2, 1989, Atlantia answered the petition and prayed for a trial by jury. (App. 93a-97a) Nine days later, Youn filed an amended petition invoking article 1732(6) of the Louisiana Code of Civil Procedure. (App. 98a-99a) Youn then moved to strike the jury trial request, which motion was granted by the trial court. (App. 101a and 66a)

Atlantia and MOC applied for supervisory writs to the Louisiana court of appeal, which were denied. Atlantia and MOC then applied for supervisory writs to the Louisiana Supreme Court, which were also denied. (App. 67a-70a)

The case was subsequently tried without a jury in September 1990. The trial court rendered judgment in favor of Youn on December 17, 1990, against all defendants in the amount of $1,703,864.00, plus prejudgment and postjudgment interest. (App. 71a-83a)

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[2] Before filing his petition, Youn had District Judge Goldsmith sign an order in Gonzales (Ascension Parish), Louisiana, granting him leave to file interrogatories in excess of the number permitted by the local rules. (App. 92a) Youn then filed his petition and the signed order with the clerk of court in Convent (St. James Parish), Louisiana. (App. 84a). Through this procedure, Youn's counsel was able to obtain Judge Goldsmith as the trial judge.

The trial court found defendants 100% at fault in causing Youn's injuries, which was affirmed by the court of appeal. However, Youn's own testimony established that (1) he was acting as supervisor at the time he was injured and responsible for ensuring the safety of the procedure involved (App. 106a-109a); (2) he knew of two methods of conducting the procedure, one of which was safer than the other (App. 110a-112a); and (3) he chose to use a less safe method because it was "faster" and "easier." (App. 110a).

On December 21, 1992, the Louisiana Supreme Court denied MOC and Atlantia's writ application on the issues raised in this Petition.

REASONS FOR GRANTING THE WRIT

I. Article 1732(6) Violates the Supremacy and Equal Protection Clauses Because It Singles Out Defendants Faced With Federal Admiralty Law Claims and Denies Them the Jury Trial Right Available to Defendants Faced With Similar State Law Claims.

By adopting Article 1732(6) in 1988, the Louisiana Legislature stripped defendants in federal admiralty cases in state court of the right to trial by jury, a right which Louisiana regards as fundamental to fairness in personal injury cases generally. This Court has long recognized that states may not discriminate against federal causes of action. The Louisiana courts have justified this discrimination against federal defendants by drawing an analogy to the election Congress provides admiralty plaintiffs in federal court. The Constitution, however,

permits Congress to make distinctions forbidden to the states, and, in any event, the Louisiana justice system differs from the federal system in many important respects.

This Court should grant certiorari to carry out this Court's institutional role in protecting federal rights from abridgement by state statutes. Petitioners have no other avenue for relief. The United States Court of Appeals for the Fifth Circuit has held that these cases are not removable.

A. Louisiana Has Singled Out Defendants in Federal Admiralty Cases and Has Denied Them the Right to Trial by Jury.

Louisiana generally affords the right to trial by jury to parties in cases involving state law personal injury claims, if the amount sought is in excess of $20,000. La. Code Civ. Proc. arts. 1731, 1732(1). The jury trial right in such cases is "fundamental in character." *Cambridge Corner Corp. v. Menard*, 525 So. 2d 527, 530-31 (La. 1988) (quoting *Champagne v. American S. Ins. Co.*, 295 So. 2d 437, 439 (La. 1974)). Louisiana generally does not permit a plaintiff to manipulate his pleadings to defeat that right. For example, in *Guillory v. State Farm Mut. Auto. Ins. Co.*, 509 So. 2d 853 (La. Ct. App. 1987), the Court held that, once a defendant requests a jury trial, a plaintiff may not defeat that right by moving to amend to claim less than $20,000.

Article 1732(6), however, as interpreted here and in *Parker v. Rowan Cos.*, 599 So. 2d 296 (La.), *cert. denied*, 113 S. Ct. 203 (1992), permits a plaintiff in a federal admiralty

proceeding in state court to amend his pleadings at any time to defeat the defendant's request for trial by jury. This extraordinary weapon applies to no other cause of action in Louisiana. It can only be used against defendants in federal admiralty cases.

B. This Court Has Long Recognized That State Courts Adjudicating Federal Rights Must Apply Procedural Rules Which Are Neutral and Do Not Discriminate Against Federal Causes of Action.

This Court has long recognized that state courts adjudicating federal rights must apply procedural rules which are neutral and do not discriminate against federal causes of action. For example, in *McKnett v. St. Louis & S. F. Ry.*, 292 U.S. 230, 234 (1934), this Court held that Alabama could not refuse to entertain an action under the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.*, which arose in Tennessee, when Alabama would have accepted jurisdiction of a state law cause of action arising in Tennessee. "A state," this Court declared, "may not discriminate against rights arising under federal laws." *Id.* Similarly, state courts adjudicating federal rights must "remain open to [federal] litigants on the same basis that they are open to litigants with causes of action springing from a different source." *Miles v. Illinois Cen. R.R.*, 315 U.S. 698, 703 (1942) (state could not enjoin FELA proceeding in another state simply because federal statute made proceeding there burdensome). *See also Missouri ex rel. Southern Pacific Ry. Co. v. Mayfield*, 340 U.S. 1, 4 (1950) (When dealing with federal rights, state must "enforce its policy impartially").

Summarizing these cases, this Court in *Howlett v. Rose*, 496 U.S. 356 (1990), held that a state could not permit a sovereign immunity defense to an action under 42 U.S.C. § 1983 when it allowed no such defense to analogous state law tort suits against officials. This Court said:

> The Supremacy Clause makes [federal] laws "the Supreme Law of the Land," and charges state courts with a coordinate responsibility to enforce that law *according to their regular modes of procedure.*

Id. at 367 (emphasis added). *See also id.* at 372 ("States may apply their own neutral procedural rules to federal claims . . . "). After quoting *Miles*, this Court observed that the only occasions in which the Court had found a "valid excuse" for allowing state defenses to federal claims "involved a neutral rule of judicial administration," such as forum non conveniens. *Id.* at 2442 (citing *Mayfield*).

Here the state statute is not "regular" or "neutral." On its face, it discriminates against defendants in federal causes of action.

C. An Analogy to the Federal Admiralty Election Cannot Justify the Louisiana Scheme.

The Louisiana Supreme Court erred in *Parker*, when it attempted to justify Article 1732(6) as a rough equivalent of Federal Rule of Civil Procedure 9(h), which permits a federal plaintiff to designate his case as an admiralty case for trial without a jury. *See Parker*, 599 So. 2d at 298-99.

First, while Congress can discriminate against defendants in admiralty causes of action the Constitution has committed to its care, *see* U.S. Const. art. III, § 2, nothing in the Constitution confers similar powers on the states. To the contrary, both the Supremacy Clause and the Equal Protection Clause expressly restrict state action and do not apply, by their terms, to Congress.

Second, there is no reason to equate the state and federal elections. Congress has permitted an election when it would result in a trial before an Article III judge. The election in some cases is permanent. A plaintiff may not amend his pleadings to take away the jury trial if such a right exists by virtue of diversity or if the trial court refuses to permit an amendment under Federal Rule of Civil Procedure 15. *See Rachal v. Ingram Corp.*, 795 F.2d 1210, 1216-17 (5th Cir. 1986).

In Louisiana, on the other hand, trial judges are not Article III judges. They are elected, and lawyers may contribute to their campaigns. The plaintiff in this case, by filing an early request for additional interrogatories, was able to choose which state court judge would hear the case. Louisiana also permits a plaintiff to add or drop the Article 1732(6) election after the identity of the judge is known. *See Parker*, 599 So. 2d at 302.

This Court need not engage in criticism of the Louisiana justice system in order to agree that these distinctions demonstrate that the analogy between the federal and state systems is false.

The Louisiana justice system is an organic whole of which the defendant's jury trial right is an essential part. In adjudicating state law personal injury causes of action,

Louisiana recognizes a jury trial right as a fundamental ingredient of a fair proceeding, and a protection from arbitrary judges who are subject to electoral pressures. In deciding federal admiralty cases, however, Louisiana denies that right. The Constitution protects defendants in such cases from being singled out for special mistreatment. *See Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112 (1949) ("[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally.") (Jackson, J., concurring).

D. Review Here Is Essential to Protect Petitioners' Federal Rights.

Two factors counsel in favor of review here: this Court's historic role in protecting federal rights abridged by state statutes, and the unavailability of any other forum for deciding the issue.

First, the abridgment of federal rights by state statutes presents a special danger for the federal system. If state political forces have sufficient strength to enact legislation defeating federal rights, then those forces may also play a role in influencing the state judiciary. A case such as this before the 1988 amendment to 28 U.S.C. § 1257 would have been found on this Court's appellate docket as an appeal of right. While Congress has now given this Court discretion to decline review, it should be a factor in exercising that discretion that this is a case in

which the validity of a state statute is drawn into question on the ground of being repugnant to the Constitution.

Second, there is no other forum, other than the Louisiana Supreme Court, where this issue can be adjudicated. The United States Court of Appeals for the Fifth Circuit has held that these cases are not removable. *Linton v. Great Lakes Dredge & Dock Co.*, 964 F.2d 1480 (5th Cir.), *cert. denied*, 113 S. Ct. 467 (1992). In so doing, the Fifth Circuit declined to address the constitutional issues MOC offered in an amicus brief, but said those issues deserved "full briefing and adversary presentation" in a case other than *Linton*. 964 F.2d at 1488 n.15. By denying removal, however, that Court ensured that the future case would not be heard in the Fifth Circuit.

Finally, it should not be controlling here that in *Parker* this Court denied a petition for writ of certiorari which sought to raise similar constitutional issues. *See* Petition for Writ of Certiorari, *Rowan Cos. v. Parker*, No. 92-221, at 9-18.

In *Parker*, the Louisiana Supreme Court did not expressly address these constitutional issues. Here, the Louisiana Court of Appeals expressly considered and rejected the claims, 605 So. 2d at 195, and the Louisiana Supreme Court has now refused review, 609 So. 2d at 240. The Louisiana Supreme Court's cursory denial of petitioners' writ removes any doubt that may have remained after *Parker* as to whether that Court would reconsider its *Parker* holding in light of the Fifth Circuit's suggestion that these constitutional issues deserved fuller treatment.

Moreover, unlike the Petition here, the *Parker* petition did not discuss this Court's controlling cases, did not offer any reasons for rejecting the federal analogy, and did not address any of the factors apart from the merits which support a grant of review.

For these reasons, this Court should grant review and hold that Article 1732(6) denies petitioners their rights under the Supremacy and Equal Protection Clauses by depriving defendants in federal admiralty cases of the right to jury trial, an essential protection from judicial arbitrariness afforded to all other parties in personal injury litigation in Louisiana.

II. The Louisiana Courts Misapplied Substantive Federal Admiralty Law in Assessing 100% Liability Against MOC and Atlantia.

State courts adjudicating admiralty and general maritime claims pursuant to the jurisdictional grant of the saving to suitors clause, 28 U.S.C. § 1333, are required to apply substantive federal admiralty law. *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222-23 (1986); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 243 (1942). *See also* 14 Charles A. Wright et al., *Federal Practice & Procedure* § 3672, at 442 (2d ed. 1985). Moreover, when the state courts have attempted to depart from federal admiralty principles, this Court has not hesitated to exercise its discretionary jurisdiction. *See McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221, 223-24 (1958); *Garrett*, 317 U.S. at 245-47.

In the present case, the Louisiana courts misapplied federal admiralty law by finding MOC and Atlantia to be

100% at fault in causing the accident in question. Federal admiralty law requires some percentage of fault to be assigned to a seaman in a supervisory position who chooses to use an unsafe procedure when he knows a safer procedure is available. Here, Youn admitted that he was supervising the operation in question, knew of a safer method for performing the operation, but chose a less safe method because it was "faster" and "easier."

A seaman has a duty to protect himself from injury, and the breach of that duty mitigates a vessel owner's liability. When a seaman engages in a course of action which involves risks, and he is aware of a safer alternative, he breaches his duty in failing to follow the safer course of action. Any resulting damages are, at least in part, attributable to his own actions in choosing the unsafe procedure. Factors such as age and experience must be considered in assessing the seaman's conduct. *Thezan v. Maritime Overseas Corp.*, 708 F.2d 175, 180-81 (5th Cir. 1983), *cert. denied*, 464 U.S. 1050 (1984); *Ceja v. Mike Hooks, Inc.*, 690 F.2d 1191, 1195 (5th Cir. 1982); *Robinson v. Zapata Corp.*, 664 F.2d 45, 49 (5th Cir. 1981); *Joyce v. Atlantic Richfield Co.*, 651 F.2d 676, 682-83 (10th Cir. 1981). A shipowner may establish the defense of comparative negligence by showing merely that the plaintiff's fault played some part, however slight, in producing the injury. *Alverez v. J. Ray McDermott & Co.*, 674 F.2d 1037, 1043 (5th Cir. 1982).

The trial court treated the issue of Youn's fault in causing the accident as a battle of the experts and chose to credit the testimony of Youn's expert. The appellate court simply held that these findings were not clearly erroneous. MOC and Atlantia readily admit that the role

of this Court is not to review credibility determinations or resolve a battle between expert witnesses. However, in the present case, assessing the credibility of the testimony of the various expert witnesses makes no difference. Youn's own testimony established his negligence under settled principles of federal admiralty law.

As bosun, Youn was in charge of the procedure being utilized when his accident occurred. He admitted that he was the most experienced person aboard the ATLANTIA in conducting the procedure. He was even responsible for training and supervising the deck crew in how the operation should be done. He was further responsible for ensuring the safety of the operation. (App. 106a-109a) Youn further admitted that he was aware of an alternative procedure than the one he used on the day of his accident, that the alternative was safer, but that he chose the less safe method because it was "faster" and "easier." (App. 110a-112a)

Thus, Youn's own admissions establish that he was at least contributorily negligent under federal admiralty law. Since he further testified that there were purported problems with the equipment aboard the ATLANTIA about which he was aware prior to the accident, federal admiralty law specifies that Youn had even a greater duty to choose the safer method. *See Robinson*, 664 F.2d at 49. (finding that the failure of seamen to use available safe alternative to problem created by lack of proper equipment was negligence).

Thus, the state courts failed to apply properly the federal admiralty law on comparative negligence. This failure is particularly troublesome in light of the fact that

MOC and Atlantia were denied their fundamental right to a trial by jury.

CONCLUSION

In summary, Article 1732(6) of the Louisiana Code of Civil Procedure violates notions of federal supremacy and equal protection embodied in the United States Constitution. Louisiana construes the right to jury trial in connection with state law claims as being fundamental in character and a right which is substantive in nature. In contrast, the Louisiana courts adjudicating federal admiralty claims under the saving to suitors clause treat the right to jury trial with much less protection. The scheme presently established in the Louisiana courts not only discriminates against parties adjudicating federal claims, but also fails to provide certain protections afforded litigants in federal court.

Moreover, the Louisiana courts misconstrued principles of substantive federal admiralty law in adjudicating the claims in this case. Specifically, those courts disregarded the settled admiralty law rule that a seaman in a supervisory position who chooses to perform his work by means of an unsafe procedure, even though he knows a safer procedure is available, is guilty of contributory negligence.

For these reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

HAE WOO YOUN

v.

MARITIME OVERSEAS CORP., Atlantia Tanker Corp., and Assuranceforengen Gard.

No. 91-CA-407

Court of Appeal of Louisiana
Fifth Circuit.

July 27, 1992.

Rehearing Denied, Oct. 19, 1992.

Paul Due, Due, Smith & Caballero, Baton Rouge, Gordon Crawford, Gonzales, Lewis Unglesby, Unglesby & Barrios, Baton Rouge, for plaintiff, appellee.

F. Scott Kaiser, Thomas Kiggins, Phelps, Dunbar, Marks, Claverie & Sims, Baton Rouge, M.D. Yaeger, Terriberry, Carroll, Yancey & Farrell, New Orleans, James B. Kemp, New Orleans, for defendants, appellants.

Before BOWES, GRISBAUM and WICKER, JJ.

BOWES, Judge.

Plaintiff, Hae Woo Youn, filed suit for damages, naming as defendants Maritime Overseas Corporation (MOC) and Atlantia Tanker Corporation (Atlantia) under the Jones Act, 46 U.S.C.App. Section 688 and also the general maritime law pursuant to the "savings to suitors" clause of 28 U.S.C. Section 1333. Youn subsequently amended his petition to also name, as a defendant, Assuranceforeningen [sic] GARD (GARD), the marine liability insurer for MOC and Atlantia. After trial on the merits,

judgment was rendered in favor of plaintiff and against all defendants, in solido, for $1,703,864.00, plus interest and costs. After the denial of defendants' motions for new trial, this appeal was perfected. We amend and as amended, affirm in part and remand in part the judgment of the trial court.

FACTS

Plaintiff, Hae Woo Youn, was the boatswain ("bosun") on the M/T Atlantia, a Liberia oil tanker owned by Atlantia. The M/T Atlantia was operated by and the crew furnished by MOC. On May 23, 1989, Youn, and two other crew members, working under Youn's instructions, were using the ship's port winch preparing to hoist the ship's gangway back on board in preparation for the ship's departure. The winch controls consist of a lever and a steam valve. A crew member, O/S Hae, locked the control lever into place (direction) and then opened the steam valve to start the rotation of the gypsy head drum, which pulls in the slack of the wire cable used to hoist heavy objects. The steam valve opened too quickly, causing the drum to spin too fast and out of control, which resulted in the cable coming off the gypsy head and whipping around uncontrollably on the deck floor. Plaintiff called to Quartermaster Choi to engage the stopper to keep the crane boom from falling, however, Choi became frightened and abandoned his post. Youn ran to the stopper and en route there, was hit by the cable, causing serious and permanent injury and deformity to his left leg.

ISSUES: MOC AND ATLANTIA

On appeal, MOC and Atlantia allege the following assignments of error:

1.

If the district court had subject matter jurisdiction, it erred in denying defendants the right to a jury trial.

2.

The trial court erred in assuming jurisdiction because Youn designated his suit as an "admiralty or general maritime claim pursuant to La.Code Civ.P. art. 1732(6) thereby invoking the exclusive jurisdiction of the federal admiralty courts.

3.

The trial court erred in finding that the M/T ATLANTIA was unseaworthy and that such condition caused Youn's injuries.

4.

The trial court erred in finding that defendants were negligent and that such negligence caused Youn's injuries.

5.

The trial court erred in finding no comparative negligence on the part of Youn, who chose to use an unsafe procedure because it was "faster" and "easier."

6.

The trial court erred in denying defendants' Motion to Supplement the Record and Motion for New Trial whereas Youn was permitted to offer post-trial evidence to prove both liability and damages, and the evidence offered by defendants was intended to prevent the perpetration of a fraud on the court.

7.

The trial court erred in assessing liability against MOC because it was not the owner or operator of the M/T ATLANTIA, and was not Youn's employer.

8.

The trial court's award of general damages in the amount of $1,400,000.00 is excessive. The award should be substantially reduced or set aside and a new trial ordered.

9.

The trial court erred in awarding prejudgment interest as to the entire damage award since a substantial portion of the award represents future losses for which interest would not have accrued.

10.

The evidence does not support the trial court's award for future medical expenses in the amount of $40,000.00.

11.

The evidence does not support the trial court's award for past loss of earnings in the amount of $22,642.00.

12.

The evidence does not support the trial court's award of past and future loss of "found" in the amount of $41,222.00.

ISSUES: GARD

GARD alleges as error the following:

1.

The trial court erred in not dismissing the petition, as amended, for want of subject matter jurisdiction, plaintiff having designated his claims as purely admiralty or maritime claims of which federal district courts have exclusive jurisdiction.

2.

The trial court erred in denying the defendants their substantive federal right to trial by jury of Jones Act and general maritime law claims.

3.

The trial court erred in not maintaining GARD's exception of no cause of action or no right of action against it under the Louisiana Direct Action Statute, La.R.S. 22:655, or otherwise.

4.

With plaintiff not having met his burden of proving any insurance coverage and the terms and provisions of any such coverage, the trial court erred in rendering judgment against GARD.

5.

The trial court erred in denying GARD's motion for continuance of the trial.

We shall consider GARD's assignments of error later in logical sequence, but first we shall consider the assignments of error by both Atlantia and MOC in convenient groups as follows:

TRIAL BY JURY/SUBJECT MATTER JURISDICTION

Defendants, Atlantia and MOC, as well as defendant GARD, first argue that the trial court action in striking MOC and Atlantia's request for a jury was error. They also agree and urge that a plaintiff's designation of his suit as admiralty or maritime under C.C.P. art. 1732(6) impermissibly usurps jurisdiction of admiralty cases from the federal courts. Finally, it is alleged that C.C.P. art.

1732(6) is unconstitutional in that it operates to deprive a defendant his right to trial by jury.

In response to plaintiff's original petition, Atlantia in its answer, requested trial by jury. Plaintiff then filed a first supplemental and amending petition, in which he clarified his position that he was filing suit both under the Jones Act and under General Maritime Law and further stated that "Plaintiff specifically designates this suit as an admiralty or general maritime claim for purposes of eliminating any right to trial by jury in accordance with 1732(6) of the Louisiana Code of Civil Procedure."

Plaintiff next filed a second amended petition which again stated that his claim was a general maritime claim and therefore defendants had no right to a jury trial under LSA-C.C.P. art. 1732(6).

MOC then filed its answer, and also requested a jury trial therein.

Plaintiff filed a motion to strike defendant's jury demands which was granted by the trial court. MOC and Atlantia applied for supervisory writs to this Court. Writs were refused.

Defendant's application for a review of our decision was quickly filed with the Louisiana Supreme Court who also refused writs. *Hae Woo Youn v. Maritime Overseas Corporation*, 559 So.2d 1367 (La. 1990). Thus, our decision was, in effect, affirmed by the Supreme Court.

Immediately before trial, GARD filed a removal notice alleging that plaintiff's election to proceed under general maritime law operated to divest the trial court of jurisdiction. Federal District Judge Sear of the Eastern

District of Louisiana found no merit to defendant's argument as it remanded the case back to state court before the state court trial began.

Youn asserts that the decisions of this court and the Louisiana Supreme Court, denying defendant's supervisory relief should be considered "law of the case," precluding further consideration of these issues.

The Louisiana Supreme Court explained the principle of "law of the case" in *Day v. Campbell-Grosjean Roofing & Sh. Metal Corp.*, 260 La. 325, 256 So.2d 105, 107 (1971):

> With regard to an appellate court, the 'law of the case' refers to a policy by which the court will not, on a subsequent appeal, reconsider prior rulings in the same case. This policy applies only against those who were parties to the case when the former appellate decision was rendered and who thus had their day in court. Among reasons assigned for application of the policy are: the avoidance of indefinite relitigation of the same issue; the desirability of consistency of the result in the same litigation; and the efficiency, and the essential fairness to both parties, of affording a single opportunity for the argument and decision of matter at issue. [Footnotes omitted].

The "law of the case" principle applies to all decisions of an appellate court, not merely those arising from the full appeal process. *Mihalopoulos v. Westwind Africa Line, Ltd.*, 511 So.2d 771 (La.App. 5 Cir.1987); *City of New Orleans v. Rasmussen*, 542 So.2d 13 (La.App. 4 Cir.1989), *writ denied*, 548 So.2d 334 (La.1989).

Ordinarily, we would decline to reconsider this issue pursuant to the principle of "law of the case." However, in this instance, we note that GARD was not a party to the suit at the time the issue was raised by writs to this Court and the Louisiana Supreme Court. The principle of "law of the case" is to be applied only against those who were parties to the cases when the former appellate decision was rendered and who thus had their day in court. *Gaudet v. G.D.C., Inc.*, 477 So.2d 731 (La.App. 1 Cir.1985); *Day v. Campbell-Grosjean Roofing & Sh. Metal Corp.*, supra.

Accordingly, we *will consider* these issues again in this appeal.

LSA-C.C.P. art. 1732(6) provides that a trial by jury shall *not* be available in:

> A suit on an admiralty or general maritime claim under federal law that is brought in state court under a federal 'saving to suitors' clause, if the plaintiff has designated that suit as an admiralty or general maritime claim.

Defendants' first allegation, that the trial court erred in striking their request for jury trial, was found meritless in *Heinhuis v. Venture Associates, Inc.*, 558 So.2d 1244 (La.App. 1 Cir.1990), *writ denied*, 559 So.2d 1369 and 1385 (La.1990), wherein the court held that, pursuant to C.C.P. art. 1732(6), the option of whether or not to have a jury trial rests *solely* with the *plaintiff*. Furthermore, plaintiff's cumulation of his Jones Act claim with an admiralty or general maritime claim does *not* open the door for the defendant Jones Act employer to demand a jury trial.

At the time of oral argument in November, 1991, *Heinhuis* was the only positive ruling on this issue,

although there was a case from the Fourth Circuit, *Gauchet v. Chevron USA Inc.*, 541 So.2d 272 (La.App. 4 Cir.1989), which expressed a contrary sentiment in dicta – and at that time, we chose to follow the *Heinhuis* ruling as the more correct interpretation. Since that time, however, on May 26, 1992, the Louisiana Supreme Court has settled the matter with finality by holding, *on rehearing*, that Jones Act claims are admiralty and maritime claims and that, pursuant to LSA-C.C.P. art. 1732(6), the plaintiff alone had the right to elect whether his case would be decided by a jury or by the trial court. *Parker v. Rowan Companies, Inc.*, 599 So.2d 296 (La.1992).

In *Sons v. Inland Marine Service, Inc.*, 577 So.2d 225 (La.App. 1 Cir.1991), the First Circuit rejected defendants second argument, that the legislature, in its enactment of C.C.P. art. 1732(6), supra, prohibiting jury trials in admiralty or general maritime cases, attempted to usurp jurisdiction of admiralty cases from the federal courts, contrary to the United States Constitution. In rejecting this argument, the First Circuit stated that:

> . . . the article does not impermissibly usurp jurisdiction of admiralty cases because state courts already have concurrent jurisdiction over *in personam* admiralty actions. Nothing in the article seeks to establish jurisdiction over *in rem* admiralty suits, which are *exclusively* within the jurisdiction of federal courts. Therefore, defendants' first argument has not merit. At p. 229. [Emphasis partially ours].

Defendants' position was also rejected by the Eastern District of Louisiana in *Bergeron v. Quality Shipyards*, 765 F.Supp. 321, 323 (E.D.La.1991), wherein the court said:

> Second, we are at a loss, from either a logical or legal perspective, as to how the invocation of a state procedural rule which limits the availability of a jury trial in a state court proceeding, confers upon this court exclusive federal admiralty jurisdiction. It is well established that state courts have concurrent jurisdiction to try in personam admiralty actions. [Citations omitted].

Defendants next argue that the trial court's action in striking their demand for trial by jury violated their constitutional rights under the Supremacy Clause and the Equal Protection Clause of the United States Constitution.

In *Sons*, supra, this same argument was rejected:

> Defendants contend the trial court's denial of their request for a trial by jury denies them due process, equal protection of the laws, and equal access to the courts in violation of the United States and Louisiana Constitutions. However, the United States Supreme Court has held that the Seventh Amendment right to jury trials in civil cases is not so fundamental to the American system of justice as to be required of state courts by the due process clause of the Fourteenth Amendment. See *Melancon v. McKeithen*, 345 F.Supp. 1025, 1035 (E.D.La.1972), *affirmed*, 409 U.S. 943, 1098, 93 S.Ct. 289, 908, 34 L.Ed.2d 214, 679 (1973); *Rudolph v. Massachusetts Bay Insurance Co.*, 472 So.2d 901 (La.1985). The denial of a jury trial in a state civil proceeding also does not violate the equal protection clause of the United States Constitution. *Letendre v. Fugate*, 701 F.2d 1093 (4th Cir 1983).
>
> In addition, there is no due process right to a jury trial in civil cases under the Louisiana Constitution of 1974. See *Fidelity & Guaranty*

Insurance Company v. Succession of Smith, 525 So.2d 348, 353 n. 3 (La.App. 1st Cir.1988). At page 229.

The court then noted that the state had legitimate interests in enacting LSA-C.C.P. art 1732(6), first to make the procedure in state admiralty cases consistent with the procedure in the federal court system, where a plaintiff may also designate his claim as an admiralty or general maritime claim to preclude defendant from having a jury trial, (see F.R.C.P. 9(h) and *Romero v. Bethlehem Steel Corporation*, 515 F.2d 1249 (5th Cir.1975), and second to minimize the delays and greater court costs which generally attend jury trials. *Sons*, supra and *Heinhuis*, supra.

Finally, the court noted that the denial of a jury trial does not operate to deny defendants access to the courts as "they still will have an adequate opportunity to defend themselves before an impartial trier of fact." At page 230.

Accordingly, these assignments of error are rejected.

LIABILITY FOR PLAINTIFF'S INJURIES

Atlantia and MOC allege that the trial court erred in finding them 100% liable to plaintiff under the theories of unseaworthy and negligence.

Initially, we note that the Louisiana Supreme Court has set down instructions very emphatically, and on several occasions, relative to the findings of fact made by the trial court, as enunciated in *Rosell v. Esco*, 549 So.2d 840 (La.1989) (and other cases) and more recently, and more positively, in *Martin v. East Jefferson General Hospital, et al.*,

582 So.2d 1272 (La.1991), and we acknowledge that appellate courts are bound to abide by same. In *Martin*, the Supreme Court stated:

> . . . 'if the trial court or jury's findings *are reasonable* in light of the *record* reviewed in its *entirety*, the court of appeal may not reverse, even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.' *Sistler v. Liberty Mutual Ins. Co.*, 558 So.2d 1106, 1112 (La.1990); *Arceneaux v. Domingue*, 365 So.2d 1330 (La.1978). We have instructed the appellate courts that when there are two permissible views of the evidence, the factfinder's choice between them *cannot* be manifestly erroneous or clearly wrong. [Emphasis added].

Additionally, in *Sutton v. Central Gulf Lines, Inc.*, 433 So.2d 888, 891 (La.App. 5 Cir.1983), this Court examined the scope of review applicable in an admiralty case (Jones Act):

> Initially, we acknowledge that while we enjoy full constitutional authority to review both the law and facts in civil cases; nevertheless, under federal law and jurisprudence, the findings of the trial judge on the merits may not be disturbed unless they are clearly erroneous. Jones Act, 46 U.S.C.A. Section 688; Federal Rule of Civil Procedure, Rule 52(a); *Cooper v. Keyes Offshore, Inc.*, 421 So.2d 385 (La.App. 1 Cir.1982); *Portier v. Texaco, Inc.*, 426 So.2d 623 (La.App. 1 Cir. 1982). The courts in *Cooper, supra*, and *Portier, supra*, both looked to the United States Supreme Court for an explanation of the 'clearly erroneous' rule and in *McAllister v. United States*,

348 U.S. 19, 75 S.Ct. 6, 99 L.Ed. 20 (1954), found the following:

> A finding is clearly erroneous when 'although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' 348 U.S. at 20, 75 S.Ct. at 7.

The trial court made findings of fact as follows:

The accident happened because the boat was in an unseaworthy condition, and because of negligence. The winch control lever had been broken for some period of time and did not operate. Accepting the testimony in the light most favorable to the defendants, the Court finds that the winch lever was dysfunctional. Furthermore, the lever could easily and should easily have been repaired during the six months that it was broken while the boat was in American waters. The crew was non-trained. The Court is impressed by the testimony of all crew members that there were no safety manuals written in Korean, that there was no training provided for any crew members, and that the procedure of MOC as to hire the Korean crew member and put him on the boat. On-the-job training can be expected to lead to accidents. Defendants were negligent. They allowed the crew to use the steam valve because the winch lever did not work. The Court finds that the use of the steam valve is not a safe method, and is not the method intended in the design of the ship for the use of the winch. Mr. Heu released too much steam, accelerating the speed of the winch, leading to the accident. The negligence of a crew member in employing a method

approved by his employer is actionable. Choi was ordered to engage the crane reel stopper in the event that the winch control lever began to operate out of control. Choi, because he was afraid, and was being peppered by debris coming off the cable, ran from his post. This placed Bosum Youn in the predicament of having no stopper. At the time that Choi abandons his post, the winch is out of control, Heu has over-accelerated the steam, and the crane boom is beginning to fall. Youn attempts to take action to preserve his employer's property and to save the lives of his fellow workers. The winch cable snaps Youn's leg, creating his injury.

The Court resolves this as a simple matter. The Court finds that there is gross negligence in regard to the failure of MOC and Atlantia to provide a seaworthy vessel, and to repair a known broken piece of equipment. The burden of the plaintiff is light. A vessel owner/ employer is deemed negligent if it fails to exercise reasonable care to maintain a reasonably safe work environment. In this case, the evidence overwhelmingly preponderates in favor of plaintiff and against defendant.

The Court finds as a fact, that the crew was not properly trained in the operation of the winch. The Court finds as a fact, that there was no training to the crew as to what action to take in the event the winch became out of control as occurred here, and further, that because the vessel owner failed to repair the broken winch, or to employ an automatic stopper, it was foreseeable that an event such as this would occur. The Court finds that at no time, did any superior

member of the Atlantia crew, or MOC Corporation, require Youn or anyone else to use any alternative method in winding the winch.

Defendants argue that the use of the gypsy head to wind the excess cable onto the winch drum, would avoid the accident. The defendants suggest that all slack between the crane reel and winch drum should be taken in. The Court was impressed by the fact that the actions taken by Youn appeared to be commonplace, and further that the captain of the boat had no knowledge as to what methodology was correct. The captain admits that they were in a substantial hurry because the pilot had come to move the boat and that it was Youn's job to get the crane in a position to shove off. Youn testified and his crew members support the idea, that the method he was using was the most efficient, and that they had never been instructed to avoid that method nor of any safety hazards created by the method.

The Court is not impressed by the defendants' efforts to blame the accident on Youn's use of the method employed by him, instead of their failure to train their crew, and to repair their broken equipment which they provided to Youn.

The Court is not impressed by the claim that Youn used a 'shortcut' in view of the Captain's testimony that they were in a hurry to take off, and all witnesses' testimony that Youn was an experienced, knowledgeable bosun. The Court finds that had the winch been repaired, or had the untrained crew members stayed at their post, or had the steam valve not been overcharged, the accident would have been avoided.

All this is directly placed at the feet of the defendants. Furthermore, from reviewing the evidence, including the photographs, the Court does not believe that it would be practical or probable, that all of the line could be placed on the gypsy head.

* * *

The Court does not find Mr. Youn contributorily negligent. He acted in accordance with his training, he was given inadequately trained helpers, one of whom abandoned his post, and he was required to work with defective equipment. The Court is well aware of the pressure placed upon a foreign seaman to do the job required, and the inability of a seaman to refuse his duties. The Court further notes the substantial conflicts in the testimony of the crew between their discovery depositions taken by the plaintiff and their trial depositions several days later. The Court recognizes in those depositions that the crew members were kept under the total control of the defendants, that certain relevant crew members were present in New Orleans in order to provide information to defense counsel, and at least one was then sent to Tokyo rather than provided for testimony. The record reflects that Port Captain Williams made an inspection of the vessel right after the accident, and condemned the actions of the crew and recognized the failure of the equipment. This information was not provided to plaintiff until the eve of trial, and then only inadvertently. The Court, in evaluating the evidence, believes the statements of the crew members taken in the discovery depositions, believes the statements of Captain Williams in his June

> inspection report, accepts the testimony of Captain George Blann as more reasonable based on facts and evaluations consistent with accepted maritime safety practices, and finds evidence in favor of Youn on the issues of unseaworthiness, negligence, and lack of comparative negligence overwhelming.

A careful review of the entire record and particularly the conclusions stated above have convinced us these findings of fact are reasonable and are abundantly sufficient to find liability in tort and under general maritime law on the part of Atlantaia [sic] and MOC. Accordingly, we find no manifest error in the findings of fact and conclusions reached by the trial court.

CLAIMS UNDER (1) THE JONES ACT AND (2) UNSEAWORTHINESS

The claims of negligence under the Jones Act and because of unseaworthiness are separate and distinct claims. *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494, 91 S.Ct. 514, 27 L.Ed.2d 562 (1971).

Under general maritime law, a shipowner has an absolute duty to provide the members of his crew with a seaworthy vessel. A ship is unseaworthy unless it and all of its appurtenances and crew are reasonably fit and safe for their intended purpose. *Miles v. Melrose*, 882 F.2d 976 (5th Cir.1989), *affirmed, Miles v. Apex Marine Corp.*, ___ U.S. ___, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990). The duty of a shipowner to provide a seaworthy vessel is absolute; actual or constructive knowledge by the owner of the unseaworthy condition is not necessary to support liability. In addition, a showing of due diligence or lack of

negligence by the owner will not negate liability. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 80 S.Ct. 926, 4 L.Ed.2d 941 (1960). To prevail on an unseaworthiness claim, a plaintiff must show that the vessel was unseaworthy and that the unseaworthy condition was the proximate cause of his injury. *Alverez v. J. Ray McDermott & Co.*, 674 F.2d 1037 (5th Cir.1982).

Under the Jones Act, a vessel owner is deemed negligent if he fails to exercise reasonable care to maintain a reasonably safe work environment. *Ceja v. Mike Hooks, Inc.*, 690 F.2d 1191 (5th Cir.1982).

The trial court found that the winch control lever was broken, and therefore the crew had to use the steam valve to control the winch. The seaman using the steam valve released too much steam, accelerating the speed of the winch and causing the accident. The trial court also found that the crew was non-trained, and that this was a fault or negligence assignable to the defendants and that this also contributed to the accident.

We see no manifest error in the trial court's judgment finding that the vessel was unseaworthy and that Atlantia and MOC were negligent in failing to provide to plaintiff a safe place to work.

Atlantia and MOC agree upon and urge that plaintiff was comparatively negligent in using the "line unattached" instead of the "line attached method."

In *Ceja*, supra at 1194, the court said:

> Generally, a seaman has *no duty* to find the safest way to perform his work. *Comeaux v. T.L. James & Co.*, supra, 666 F.2d [294] at 300 [5th

> Cir.1982]; *Spinks v. Chevron Oil Co.*, 507 F.2d 216, 223 (5th Cir.1975), *clarified*, 546 F.2d 675 (5th Cir.1977) ('His duty is to do the work assigned, not to find the safest method of work'). Rather, the duty to provide for a safe course of conduct lies primarily with the vessel owner. A seaman, therefore, is not contributorily negligent merely because he uses an unsafe tool or appliance or proceeds in an unsafe area of the ship. Only where it is shown that there existed a safe alternative available to him of which he knew or should have known, can a seaman's choice of an unsafe course of action be properly considered in determining whether he was negligent. *Accord Joyce v. Atlantic Richfield Co.*, 651 F.2d 676, 682-83 (10th Cir. 1981). [Emphasis partially ours]. [Footnotes omitted].

The trial court found that the "line unattached" method utilized by Youn was sanctioned by the defendants, that this method was commonplace and was the most efficient method to raise the gangplank. The court further found that, from the evidence, use of the "line attached" method was not practical or probable with regard to plaintiff's tasks at the time of the accident.

We see no error in the trial court's decision finding that plaintiff was not comparatively negligent.

Finally, defendants argue that the trial court erred in disregarding OSHA regulations in its determination of plaintiff's standard of care. We see nothing in the record which shows that plaintiff was aware of the OSHA regulation which indicates that the "line attached method" is safer nor do we find anything to show that defendant's training, if any, of plaintiff included teaching plaintiff

OSHA regulations. Furthermore, in light of the court's finding that using the "line attached method" was neither probable nor practical in this case, the trial court's consideration of the OSHA safety regulation would not change the outcome of this case.

TRIAL COURT'S DENIAL OF INTRODUCTION OF POST-TRIAL EVIDENCE AND/OR MOTION FOR NEW TRIAL.

After the conclusion of the trial, MOC and Atlantia sought to have introduced into evidence a videotape demonstrating how to raise and lower the boom using the portside winch on the M/T Atlantia. Defendants also filed a motion for new trial alleging that this tape constituted newly discovered evidence.

We find that the trial court did not err in denying the introduction of the videotape into evidence one month after the conclusion of trial.

The videotape is experimental evidence attempting to refute plaintiff's expert's testimony that there was too much line on the portside winch which made using the "line attached" procedure unsafe and/or impossible. Before such evidence can be considered at trial a proper foundation for its admissibility must be established. There is ample jurisprudence holding that to establish a proper foundation the offering party must affirmatively show that the experiment was conducted under similar, if not precise, conditions as were present during the original act. *Hunnicutt v. Kent*, 434 So.2d 91 (La.App. 5 Cir. 1982), *writ denied*, 435 So.2d 442 (La.1983); *Guidry v. Boston Old Colony Ins. Co.*, 540 So.2d 543 (La.App. 3 Cir.), *writ*

denied, 543 So.2d 7 (La.1989). No such showing was made in this case.

MOC and Atlantia alternatively allege that the videotape was "newly discovered" evidence and therefore the trial court erred in not granting their motion for new trial.

LSA-C.C.P. art. 1972 provides:

> A new trial shall be granted, upon contradictory motion of any party, in the following cases:
>
> (1) When the verdict or judgment appears clearly contrary to the law and the evidence.
>
> (2) When the party has discovered, since the trial, evidence important to the cause, which he could not, with due diligence, have obtained before or during the trial.
>
> (3) When the jury was bribed or has behaved improperly so that impartial justice has not been done.

To obtain a new trial on the basis of newly discovered evidence there must be a clear showing not only that the evidence was discovered after trial, but that every reasonable and diligent effort was made to procure it before trial. *LeBlanc v. Consolidated Aluminum Co.*, 401 So.2d 1082 (La. App. 3 Cir.), *writ denied*, 409 So.2d 617 (La.1981).

Defendants argue that they did not become aware of plaintiff's expert's opinion until September 12, 1990, sixteen days before trial and that at that time they began efforts to board the M/V Atlantia. The ship did not enter the United States until September 24, 1990; and then it

had to be moved several times. The videotape was made on September 28, 1990 (the same day the trial began) and defendants received it October 1, 1990 one week after trial. However, defendants did not seek to have the tape introduced into evidence until November 2, 1990 – a delay of over four weeks.

From the record before us, we find that defendants have not borne their burden of showing that the videotape was "newly discovered" evidence and therefore are not entitled to a new trial. Defendants had full knowledge that the tape was being made on the day of trial. However, they withheld this important information from the court and opposing counsel and they made no attempt to have the trial judge hold the case open until the tape could be viewed and offered into evidence.

Furthermore, although defendants received the tape on October 1st, they waited over a month to seek its introduction into evidence. Under all these circumstances, we see no abuse of discretion whatsoever in the trial court's ruling denying defendant's motion for new trial.

Although this Court allowed defendants to supplement their brief with a copy of the videotape out of an abundance of caution to insure fairness, we decline to examine the videotape since it was not introduced into evidence at trial. Uniform Rules of Court – Courts of Appeal – Rule 1-3. *Coleman E. Adler & Sons, Inc. v. Waggoner,* 538 So.2d 1131 (La.App. 5 Cir.1989).

LIABILITY OF MOC

Under both general maritime law and the Jones Act, the employer of the seamen and the vessel owner may be

liable for negligent injury or death, or injury or death resulting from the unseaworthiness of the vessel. *Symeonides v. Cosmar Compania Naviera, S.A.*, 433 So.2d 281 (La.App. 1 Cir.), *writ denied*, 440 So.2d 731 (La.1983), *cert. denied, Cosmar Compania Naviera, S.A. v. Symeon Symeonides*, 465 U.S. 1079, 104 S.Ct. 1442, 79 L.Ed.2d 762 (1984).

MOC alleges that it does not own or operate the M/T Atlantia and was not the employer of plaintiff, and therefore, the trial court erred in holding MOC liable under general maritime law or under the Jones Act.

We are aware that only an employer can be liable under the Jones Act. *Karvelis v. Constellation Lines S.A.*, 806 F.2d 49 (2nd Cir.1986), *cert. denied, Constellation Lines S.A. v. Karvelis*, 481 U.S. 1015, 107 S.Ct. 1891, 95 L.Ed.2d 498 (1987). However, for the purposes of recovery, it may be possible for a seaman to have more than one Jones Act employer. *Guidry v. South Louisiana Contractors, Inc.*, 614 F.2d 447 (5th Cir.1980). In determining who is an employer for recovery under the Jones Act, "control" is the critical inquiry:

> Factors indicating control over an employee include payment, direction, and supervision of the employee. Also relevant is the source of the power to hire and fire. The control which is exercised must be substantial; the mere possibility of some control over the actions of an employee will not suffice to find an employer-employee relationship.

Volyrakis v. M/V Isabelle, 668 F.2d 863, 866 (5th Cir.1982).

We find here that MOC was an employer under the Jones Act for the following reasons.

The record in this case establishes that all of the crew members of M/V Atlantia who testified, including plaintiff, stated that MOC was their employer. Port Captain Williams also testified that the crew of the M/V Atlantia were working "indirectly" for MOC. Donald Farmer of MOC testified that MOC was responsible for "crewing" the vessel and for attending to all crew matters. The contract between MOC and Atlantia gave MOC "sole and exclusive management . . . of the said vessel," including the power to hire and fire crew, prepare payroll and otherwise conduct all business of the vessel – nothing could be more clear. Furthermore, the reports of plaintiff's injury were sent to MOC. In view of the above facts, we see no manifest error in the trial court's finding that MOC was plaintiff's employer.

Although both plaintiff and defendants argue the ownership status of MOC, the trial court made no finding regarding MOC's status as owner pro hac vice of the M/V Atlantia. Because we find plaintiff can recover damages from MOC, under the Jones Act, the issue of whether MOC is also owner, *pro hac vice*,[1] of an

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[1] An owner pro hac vice is:

> . . . one who assumes by charter or otherwise 'exclusive possession, control, command, and navigation' of a vessel for a specific period of time. An owner *pro hac vice* 'has complete – though perhaps only temporary – dominion over the vessel entrusted to him. He commands her navigation and is entitled to avail himself fully of her services.' 'It is therefore tantamount to, though just short of, an outright transfer of ownership.' [Citations omitted].

Bernier v. Johns-Manville Sales Corp., 547 F.Supp. 389, 394 (1982).

unseaworthy vessel is academic and need not be addressed. *McFarland v. Justiss Oil Co. Inc.*, 526 So.2d 1206 (La.App. 3 Cir.1988).

DAMAGES

The trial court awarded damages to Hae Woo Youn as follows:

1.	Medical Expenses, future	$ 40,000.00
2.	Past loss of net earnings	$ 22,642.00
3.	Future loss of net earnings	$ 200,000.00
4.	Past loss of found	$ 3,748.00
5.	Future loss of found	$ 37,474.00
6.	Past physical pain and suffering	$ 200,000.00
7.	Future physical pain and suffering	$ 300,000.00
8.	Past mental anguish and loss of enjoyment of iife	$ 200,000.00
9.	Future mental anguish and loss of enjoyment of life	$ 300,000.00
10.	Disability and disfigurement	$ 400,000.00
	TOTAL	$1,703,864.00

MOC and Atlantia presents several allegations of the excessiveness of these awards.

First, defendants allege that the trial court erred in awarding $1.4 million in *general* damages.

In *Sutton v. Central Gulf Lines, Inc.*, supra, this Court set down the guidelines to review damage awards in a Jones Act case:

> In reviewing damages awarded to injured seamen under the Jones Act, such awards will

> not be disturbed unless they are so large as to shock the judicial conscience or indicate bias, passion, prejudice, corruption or any other improper notice. *Allen v. Seacoast Products, Inc.*, 623 F.2d 355 (5th Cir.1980). Further, in non-jury actions, the trial court's determination of damages is reviewable only for abuse of discretion, subject to being set aside as a finding of fact under the 'clearly erroneous' standard of Rule 52(a) of the Federal Rules of Civil Procedure. *Smith v. Manausa*, 535 F.2d 353 (6th Cir.1976). As to excessive awards, each case must be determined on its own facts and comparing damage verdicts rendered in different cases is not a satisfactory method for determining excessiveness in a particular case. *Allen*, 623 F.2d at 364 (Quoting *Wiley v. Stensaker Schiffahrtsges*, 557 F.2d 1168, 1172 (5th Cir.1977).

However, if an abuse of discretion is found, then this Court may resort to prior awards in comparable cases for guidance in fixing the appropriate award. The award may be lowered (or raised) to the highest (or lowest) point which is reasonably within the trial court's discretion. *Tracy v. Jefferson Parish*, 523 So.2d 266 (La.App. 5 Cir.), *writ denied*, 530 So.2d 569 (La.1988); *Spangler v. North Star Drilling Co.*, 552 So.2d 673 (La.App. 2 Cir.1989).

Youn's injury consisted of a severe lacerations [sic] of the femoral artery and femoral vein in his left leg and severed main artery and vein in the lower part of the leg, requiring that both the artery and vein be replaced and reconstructed. Youn initially spent five weeks and underwent five surgeries at Our Lady of the Lake Hospital in East Baton Rouge. Eventually, two-thirds of his quadriaps muscle was removed. During his hospital stay, Youn was

in great and sustain pain requiring heavy sedation. He was also fearful that his leg would have to be amputated.

After his return to Korea, Youn ruptured the hamstring muscle which required surgical repair. The condition of Youn's leg as a result of the accident prevented the hamstring muscle from healing normally, thus causing additional damage.

Youn currently has between a 30-35% disability of the left lower extremity, which translates to a 14% total disability rating of the entire body. The leg is void of muscle mass, and consists of only bone, artery and skin. His left leg is considerably thinner than his right and is covered with scars from groin to foot. However, plaintiff is able to walk without crutches or other aid, but he walks with a moderate limp. He currently takes pain medication on an occasional basis. Youn cannot stand for extended periods of time and will never be able to do heavy work. In addition, Youn may have to undergo further surgery in the future. Youn also stated that the appearance of his leg has caused him anxiety, embarrassment and pain and has caused marital difficulties.

Even though Youn's injuries are undoubtedly severe, and permanent in some respects, we find that in certain areas, the trial court abused its discretion (on the high side) in awarding damages of 1.4 million dollars. Accordingly, we turn to comparable cases to determine the highest amount the trial court could have reasonably awarded in this case.

In *Jaffarzad v. Jones Truck Lines, Inc.*, 561 So.2d 144 (La.App. 3 Cir.), *writ denied*, 565 So.2d 450 (La.1990), plaintiff suffered injuries to both legs as a result of an

automobile accident. Plaintiff was initially hospitalized for over three months during which time three surgeries were performed. After his release, he underwent two more surgeries, and his doctor predicted that he would need one more operation. Plaintiff was partially disabled, with a 15% functional impairment to his left leg and a 5% functional impairment to his right leg. He could not do prolonged walking or manual labor. Plaintiff also suffered from back pain due to his unnatural walking gait. The trial court awarded damages of $250,000.00. On appeal, the court increased plaintiff's award of general and special damages to $450,000.00.

In *Peterson v. Western World*, 536 So.2d 639 (La.App. 1 Cir.1988), *writ denied*, 541 So.2d 858 (La.1989), the 39 year old plaintiff fell fifteen to twenty feet off a structure and sustained a severe compression fracture of the right ankle, a fracture of the left heel and a compression fracture of the spine. Plaintiff was hospitalized for one week following surgery where two inch screws were implanted in his right ankle. Plaintiff was then bedridden for three weeks, wheelchair bound for a few weeks and then walked with crutches for two – three weeks. During his first few weeks, plaintiff's pain was so great he could not talk on the phone. Plaintiff underwent a second unsuccessful operation to remove the screws from his ankle. At the time of trial, plaintiff had a 25 to 40% permanent partial disability, was expected to undergo at least one more surgical procedure, was unable to continue working or participate in recreational sporting activities. On appeal, the court affirmed a general damage award of $400,000.00.

In *LeBleu v. Dynamic Indus. Constructors,* 526 So.2d 1184 (La.App. 3 Cir.), *writ denied,* 528 So.2d 154 (La.1988), plaintiff's right ankle was fractured in a construction accident (plaintiff had lost his left leg in a prior hunting accident.). After surgery, complications arose and plaintiff could not use the ankle at the time of trial. Plaintiff was totally disabled, could walk only short distances with extreme effort and could no longer enjoy recreational activities. Plaintiff also developed traumatic neurosis. On appeal the trial court affirmed a general damage award of $300,000.00.

In *Snyder v. Taylor,* 523 So.2d 1348, 1355-56 (La.App. 2 Cir.), *writ denied,* 531 So.2d 267, 268 (La.1988), plaintiff was involved in an automobile accident. His injuries were, in our opinion, similar in severity in many respects to those suffered by the plaintiff here:

> Plaintiff suffered multiple and severe injuries. He was unconscious in the highway for 40-45 minutes before an ambulance arrived. The witness Curtis said that before the ambulance arrived he observed that
>
> > The bone was sticking out of [plaintiff's] left thigh. His knee was turned around almost touching his left buttock area. His right foot was turned completely around, and his ankle bone was sticking through his sock.

Curtis said that plaintiff was screaming as he held him down and covered him with a blanket.

Plaintiff, his wife, and experts testified about the past and present extent of his injuries and disabilities. Depositions of Dr. Bailey and Dr. Moyer, the orthopedic

surgeons who treated plaintiff, were introduced. Dr. Bailey said:

> He had an obvious open fracture of the left femur, or the thighbone, between the knee and the hip, that the bone was broken and out through the skin. * * *
>
> He had a closed or a fracture without protrusion of the bone through the skin of the same leg below the knee, with obvious deformity and swelling in that area, and an obvious fracture that was out of line. [Both bones below the knee were broken.] * * *
>
> He had a dislocation of the right ankle, again open with the entire lower tibia, or shinbone, and the top of the ankle exiting, or stuck out, through the skin, also. * * *
>
> [The right foot] was attached, but was rotated about 130 degrees . . . He had no pulse in his foot.

Dr. Bailey stated that the repair of plaintiff's right ankle and foot and left leg required several surgeries in which plates and pins were inserted and bone grafts were performed.

Although the most serious injuries suffered by plaintiff were those to his lower extremities, plaintiff also suffered a broken and lacerated nose, a lacerated eyelid, a lacerated lip, a severely lacerated left forearm, and broken and disaligned teeth.

Also in *Snyder:*

> Plaintiff underwent nine separate surgical procedures.

Dr. Bailey expected plaintiff to suffer continued pain in his right ankle and weakness in his left leg due to arterial injuries.

Dr. Moyer stated that plaintiff has restricted motion of 20 percent in his right ankle and that the left tibia (lower leg) is bowed or malaligned. Dr. Moyer believed that the likelihood of a degenerative process of the left knee was 'very, very good' due to the malalignment in the left leg. He recommended that plaintiff refrain from any activity that would put pressure on his legs and suggested swimming or bike riding for physical activities.

Plaintiff testified at trial almost six years after the accident. He said he continues to suffer pain and stiffness in his right ankle, numbness in his left leg, lower back pain and stomach problems due to the extensive medication he has taken since the accident.

Plaintiff, a healthy 28-year-old engineer in 1980, was physically active and enjoyed jogging and snow skiing before the accident. He has since been unable to engage in such activities.

Plaintiff suffered what was described as severe pain, especially in the hours and days immediately following the accident. He was hospitalized more than 30 days. He was in the early stages of a career which required physical exertion. Plaintiff is forever prevented from participating in many of the previous physical activities he enjoyed and continues to suffer pain with substantial prospects for further degenerative problems.

Plaintiff's physical injuries are comparable to those suffered by the young plaintiff in *Klein*

> *v. Himbert*, 474 So.2d 513 (La.App. 4 Cir.1985), who was awarded $300,000 in general damages. Unlike the plaintiff *Klein*, supra, plaintiff's disabilities also prevent him from being a physically active civil engineer, a career for which he was educated and trained.

The appellate court found no abuse of discretion in the trial court's award of $325,000.00.

In *Simeon v. T. Smith & Sons, Inc.*, 852 F.2d 1421 (5th Cir.1988), *cert denied, T. Smith & Sons, Inc. v. Simeon*, 490 U.S. 1106, 109 S.Ct. 3156, 104 L.Ed.2d 1019 (1989), plaintiff's foot was nearly severed from his ankle. He was hospitalized for two months and underwent a series of operations. At the time of trial, plaintiff could only walk short distances, had to use a cane and was unable to return to work. He was depressed and was experiencing marital difficulties. After trial, the jury returned a verdict with a general award of damages of $1,250,000.00. The trial court ordered a remittitur of $750,000.00. On appeal, the court further reduced the award, awarding general damages of $600,000.00. In reaching this figure, the court examined eight cases involving comparable injuries, which contained various awards of general damages ranging from $75,000.00 to $500,000.00.

Comparing the facts in the above case and the various awards with the facts and the award in the present case for total damages we find that a total of $600,000.00 is the maximum amount the trial court could have reasonably awarded and accordingly, we find that the awards of damages must be reduced in this case.

We are aware that the comparable awards discussed are all for "general" damages which would include past

and future physical pain, past and future mental anguish and loss of enjoyment of life and disability and disfigurement. However, in the case sub judice, we find it *necessary to break down the award into categories* (as did the trial court) because of the necessity under admiralty law to exclude pre-judgment interest on future, unaccrued non-economic damages; see discussion, infra.

Accordingly, we partition the award of general damages as follows:[2]

TOTAL		$600,000.00
Past Physical Pain and Suffering		85,800.00
Future Physical Pain and Suffering		128,400.00
Past Mental Anguish and Loss of Enjoyment of Life		85,800.00
Future Mental Anguish and Loss of Enjoyment of Life		128,400.00
Disability and Disfigurement		171,600.00
Past	68,640.00	
Present and Future Damages	102,960.00	

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[2] In the original general damage award, the individual elements were proportionate to the whole in the following percentages: Past physical pain and suffering – 14.3%; future physical pain and suffering – 21.4%; past mental anguish and loss of enjoyment of life – 14.3%; future mental anguish and loss of enjoyment of life – 21.4%; and disability and disfigurement – 28.6%. Furthermore, the past awards compared to the future awards in a ratio of 2 to 3. Accordingly, in reducing the award, we have utilized the same percentages.

PRE-JUDGMENT INTEREST

Atlantia and MOC allege that the trial court erred in awarding pre-judgment interest on the damage award for future losses. When a case is brought under the general maritime law as well as a Jones Act claim, tried before a judge, award of pre-judgment interest lies within the trial court's discretion. *Mihalopoulos v. Westwind Africa Line, Ltd.*, supra; *Williams v. Reading and Bates Drilling Co.*, 750 F.2d 487 (5th Cir.1985).

However, while the trial court generally has discretion to award pre-judgment interest on most damage awards, pre-judgment interest is *not* awardable on future, unaccrued damages. *Boyle v. Pool Offshore Co., a Div. of Enserch Corp.*, 893 F.2d 713 (5th Cir.1990); *Spangler v. North Star Drilling Co.*, supra.

Accordingly, we further amend the judgment to reflect that plaintiff *is* entitled to *pre-judgment* interest on awards for damages *except* those for *future* damages. Plaintiff is entitled to interest from date of judgment on those amounts.

FUTURE MEDICAL EXPENSES

In order to recover for future medical expenses, a plaintiff must prove that it is more probable than not that such expenses will be undertaken and incurred. *Whatley v. Regional Transit Authority*, 563 So.2d 1194 (La.App. 4 Cir.1990), *writ denied*, 569 So.2d 965 (La.1990).

Dr. Davis, one of plaintiff's initial treating physicians, testified that the estimated longevity of a vascular graft was 10 years, therefore, it was more probable than

not that plaintiff would have to undergo surgery within ten years. Plaintiff's life expectancy from date of trial was 33.8 years; therefore, it is more probable than not that plaintiff will be required to undergo more than one surgical procedure. Dr. Davis testified further that the present cost of such surgical procedure is $10,000.00. Dr. Davis also stated that plaintiff should see a vascular surgeon for an examination once a year.

Dr. Martin Bell, another treating physician, testified that he recommended reconstruction surgery for plaintiff's thigh, which would currently cost $23,500 to $42,000.

Plaintiff testified that he presently did not wish to undergo surgery, however, Dr. Davis testified in effect, that his physical condition would decline to the point in the future where he would be *required* to undergo surgery.

Considering the above testimony we see no abuse in the trial court's discretion awarding $40,000.00 for future medical expenses.

PAST LOST EARNINGS

Defendants allege that the trial court erred in awarding lost wages without taking into consideration that Youn was paid full wages from the date of the accident until October, 1989 and 60% of his wages from November, 1989 until the trial. Defendants argue that awarding plaintiff the full amount of wages to which he was entitled from date of accident to date of trial constitutes double recovery.

Plaintiff's argument in response is two-fold. First, he argues that defendants failed to affirmatively plead offset or credit as a defense and therefore cannot raise this issue on appeal. Second, plaintiff alleges that defendants were obligated to pay these amounts as maintenance and cure.

Affirmative defenses have been held to be:

> . . . any response[s] by the defendant which raises new matter which *'assuming the allegations of the petition to be true,* constitutes a defense to the action which will have the effect of defeating the plaintiff's suit on the merits.' *Langhans v. Hale,* 345 So.2d 1226 (La.App. 1st Cir.1977), *Modicut v. Bremer,* 398 So.2d 570 (La.App. 1st Cir.1980), and *Rourke v. Cloud,* 398 So.2d 57 (La.App. 3rd Cir.1981).

Nolan v. Attwood, 484 So.2d 289, 292 (La.App. 3 Cir.1986).

The Third Circuit has also held that a claim of credit or payment is an affirmative defense which must be specifically pleaded and provided by the defendant. *Galland v. Nat. Union Fire Ins. Co.,* 452 So.2d 397 (La.App. 3 Cir.1984). We are inclined to agree.

A review of the record shows that defendants did not raise offset or credit as a defense in any of their pleadings filed. However, in the case before us, defendants are not precluded from raising payment as a defense for the following reasons. At the trial, plaintiff *stipulated* that he was paid his wages, pursuant to union contract. Donald Farmer, MOC's Assistant Manager of the Crew Department, also testified that plaintiff was paid *after* the date of the accident pursuant to union contract. Objection was made by the defendants to the introduction of the union contract itself; however, there is no objection on the

record to the evidence that plaintiff received payment from the date of injury to the date of trial.

C.C.P. art. 1154 provides:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised by the pleading. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to so amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby, and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense on the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

Accordingly, our view is that the pleadings in this case were enlarged to include the affirmative defense of setoff or credit by the introduction of evidence of payments to plaintiff without objection. In accord, see *Sider v. Robin Temporary Service,* 515 So.2d 1123 (La.App. 5 Cir.1987), *writ denied,* 519 So.2d 146 (La.1988) and *Lacroix, Waring and Derbonne v. Anderson,* 461 So.2d 1187 (La.App. 3 Cir. 1984), *writ denied,* 465 So.2d 735, 737 (La.1985).

However, our view above is actually of no help to defendants because plaintiff argues that the payments he

received were in the nature of "maintenance" and not lost wages – and we agree – for the following reasons.

In *Ceja v. Mike Hooks, Inc.*, supra, the court held that maintenance payments could *not* be deducted from an award for past lost wages and it also defined "maintenance," as follows:

> Appellant argues that the trial court erred in using the motive of preventing double recovery to offset the award of past lost wages with the amount of maintenance paid. On the basis of our recent decision, in *Morel v. Sabine Towing & Transportation Co.*, 669 F.2d 345 (5th Cir.1982), we agree.
>
> In *Morel*, appellant shipowner had appealed the district court's award of maintenance to an injured seaman during a period of compensated vacation. The *Morel* panel, viewing compensated vacation as a method of deferred wage payment and hence as 'earned wages,' held that the district court's award of both damage elements was proper as wages were 'separate and distinct from maintenance.' *Id.* at 347. The Court elaborated:
>
> > 'Maintenance' is the equivalent of the food and lodging to which a seaman is entitled while at sea. Maintenance, and its necessary companion cure, are hallowed rights of seaman who are injured or become ill while in the service of a ship. . . . Maintenance is neither a substitute for wages nor is it to be considered in lieu of a seaman's wages, in whole or in part.

> *Id.* at 346. We have concluded therefore, that absent an 'explicit contractual provision specifying that . . . wages [are] to be deemed a substitute for maintenance, there is no basis for crediting such earned wages against the vessel owner's maintenance obligation.' *Id.* (quoting *Shaw v. Ohio River Co.*, 526 F.2d 193 (3d Cir.1975). [Footnotes omitted].

In the case sub judice, the union contract specifying plaintiff's terms of employment and rate of pay provided:

SICK PAY

SECTION 17

(i) When a Seafarer is discharged and hospitalized at any port outside of Korea, because of sickness or injury, the amount equivalent to his Basic Wage daily prorate shall be paid as the Sick Pay for the hospitalization period outside of Korea.

(ii) In case the sickness or injury is due to an accident arising out of and/or in the course of the Seafarer's employment, he shall be entitled to sick pay at a rate equivalent to his Basic Wage daily prorata during the medical attention for a maximum period of four (4) months from the date of his return to Korea, and when the sickness or injury has not been cured after the lapse of this four months, the Sick Pay shall be sixty (60) percent of his Basic Wage therefrom until he is medically declared to have reached a maximum cure or to be incurable.

It is apparent that this provision sets forth a *method to calculate* the amount of "maintenance and cure" a seaman

is entitled to; it does *not* state that wages are to be paid *in lieu* of maintenance. Therefore, because there is no express contractual provision specifying that wages are to be deemed a substitute for maintenance we find that the trial court did not err in awarding lost wages without a credit for sums paid to plaintiff from date of accident to date of trial as these latter sums constitute "maintenance and cure" and *not* wages. See *Ceja, supra.*

LOSS OF "FOUND"

Defendants assigns [sic] as error, the award for the "loss of found"[3] suffered by the plaintiff in the amount of $41,222.00. We agree.

In his reasons for judgment, the trial judge gave this rationale for this item of damages:

> "The court finds that the plaintiff carried his burden of proof on the issue of 'found' through testimony that the plaintiff was provided with clothing and meals everyday which would equate to at least $10.00 per day in value. The Court takes 'judicial notice' of the costs of such matters."

LSA-C.E. 201 provides:

> A. Scope of Article. This Article governs only judicial notice of adjudicative facts. In

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[3] "Found" is a term peculiar to admiralty cases. It is usually defined as the sum which represents the living expenses furnished to the seaman by his employer as a condition of employment. Maraist, *Admiralty in a Nutshell.* It includes such elements as a seaman's daily meals and his clothing.

'adjudicative fact' is a fact normally determined by the trier of fact.

B. Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either:

(1) Generally known within the territorial jurisdiction of the trial court; or

(2) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

C. When discretionary. A court may take judicial notice, whether requested or not.

D. When mandatory. A court shall take judicial notice upon request if supplied with the information necessary for the court to determine that there is no reasonable dispute as to the fact.

E. Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior opportunity to be heard, the request may be made after judicial notice has been taken.

F. Time of taking notice. A party may request judicial notice at any stage of the proceeding but shall not do so in the hearing of a jury. Before taking judicial notice of a matter in its instructions to the jury, the court shall inform the parties before closing arguments begin.

G. Instructing jury. In a civil case, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may,

> but is not required to, accept as conclusive any fact judicially noticed.

In *Elliott v. U.S. Fidelity & Guar. Co.*, 568 So.2d 155 (La.App. 2 Cir.1990), the court observed:

> Disputed facts are not in the same vein as the laws of nature, geographic and historical facts, time, laws and other matters of common knowledge. The resolution of disputed issues of material fact by judicial notice is improper. *Pierce v. Board of Supervisors of Louisiana State University*, 392 So.2d 460 (La.App. 1 Cir.1979).

The value of lost meals and clothing are those types of facts which *are* disputed. Consequently, we find that the trial court was not entitled to take "judicial notice" of the loss of found or the amount thereof. The record reflect that plaintiff did not offer any evidence as to the value, per day, of meals and clothing or as to how many days the plaintiff would have been entitled to receive meals and clothing. Accordingly, we hold that the trial court did, indeed, err in awarding plaintiff $41,222.00 for "loss of found." This award of the trial court is obviously manifestly erroneous and will be annulled and set aside.

APPLICABILITY OF THE DIRECT ACTION STATUTE

In pre-trial, GARD filed exceptions of no cause and/or right of action, alleging among other things that it could not be sued under the Direct Action Statute, LSA-R.S. 22:655, because that statute did not apply to "ocean marine and foreign trade insurances" quoting LSA-R.S. 22:611 which provides that "the applicable provision of this [Insurance Code] shall apply to insurance other than ocean marine and foreign trade insurances." GARD now

alleges on appeal that the trial court erred in denying GARD's exception of no cause and/or right of action. We do *not* agree.

R.S. 22:655 allows a plaintiff to proceed directly against an insurance company who has issued a policy or contract of liability insurance. In *Quinlan v. Liberty Bank and Trust*, 575 So.2d 336, 347 (La.1991) the court held that the statute "applies to *any* insurance against the liability of the insured for the personal injury or corporeal property damage to a tort victim, regardless of whether the policy is formed in liability or indemnity terms[.]" [Emphasis supplied]. It has been held that protection and indemnity insurance, and more particularly, ocean marine indemnity insurance is subject to the Direct Action Statute. *Olympic Towing Corp. v. Nebel Towing Co.*, 419 F.2d 230 (5th Cir.1969), *cert. denied, Nebel Towing Co. v. Olympic Towing Co.*, 397 U.S. 989, 90 S.Ct. 1120, 25 L.Ed.2d 396 (1970); *Cushing v. Maryland Cas. Co.*, 198 F.2d 536 (5th Cir.1952) *rev'd on other grounds* 347 U.S. 409, 74 S.Ct. 608, 98 L.Ed. 806 (1954).

In *Coleman v. Jahncke Service, Inc.*, 341 F.2d 956, 960-61 (5th Cir.1965), *cert. denied, Jahncke Service, Inc. v. Greater New Orleans Expressway Commission*, 382 U.S. 974, 86 S.Ct. 538, 15 L.Ed.2d 465 (1966), the court said:

> LSA-Rev. Stat. 22:611 provides that the Louisiana Insurance Code 'shall apply to insurances other than ocean marine and foreign trade insurances.' The district court, however, held that the policy issued to Jahncke, although a policy of hull insurance, was also a public liability policy, subject to the Code, and therefore to the Direct Action Statute. The policy insured

> Jahncke against liability for personal injury or property damage caused by the Claribel. The direct action statute, by its terms, applies to every 'policy or contract of liability insurance.' Though historically no love has been lost between the direct action statute and the Fifth Circuit, we resist the temptation to manacle an old and now beaten enemy. "There is no indication in sec. 655 that the Louisiana legislature intended to deny the right of direct action to persons covered by maritime policies, while extending it to all others.

Accordingly, we agree with appellee's contention that, the general language at the beginning of section XIV (LSA-R.S. 22:611, supra) of the insurance code does *not* supersede the more specific language of the Direct Action Statute which allows a plaintiff to proceed directly against *all* liability policies, including ocean marine indemnity insurance policies.

The defendants cite *Deshotels v. SHRM Catering*, 538 So.2d 988 (La.1989); *Backhus v. Transit Cas. Co.*, 549 So.2d 283 (La.1989) and *Sifers v. General Marine Catering Co.*, 892 F.2d 386 (5th Cir.1990) in support of their contention that the direct action statute does not apply to ocean marine insurance. These cases involved the claims against the Louisiana Insurance Guaranty Association (LIGA). We find these cases distinguishable or inapplicable from the instant case and decline to follow them.[4] We are not bound by these decisions and decline to follow them.

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[4] In *Deshotels*, supra at 992-93, the court stated that:

> The Louisiana Insurance Code does not define 'ocean marine' insurance. That insurance is not only

Accordingly, we conclude that the trial court correctly denied GARD's exception of no cause and/or right of action concerning the Direct Action Statute.

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excluded from LIGA coverage but also from the scope of Part XIV, which applies to 'The Insurance Contract' and includes the Louisiana direct action statute. In context, the term 'ocean marine' is used as a synonym for traditional marine insurance, that is, property insurance on hulls, freights and cargoes. *Blair [v. Sealift, Inc.]*, supra. It contrasts with the definition of marine protection insurance in LSA-R.S. 22:6(13)(e), which is insurance against liability for death or personal injury resulting from use of a vessel 'in *ocean* or inland waterways.'

Sifers, Coe [v. L & L Sandblasting, Inc., 707 F.Supp. 874 (W.D.La.1988)], *George [v. Bailey Coke and Transport, Inc.*, 672 F.Supp. 926 (E.D.La.1987)], *Day* and *Backhus* erred in equating all insurance covering maritime claims with 'ocean marine' insurance.

LSA-R.S. 22:1377 states that Guaranty Association insurance applies 'to all kinds of direct insurance, except life, health and accident, title, disability, mortgage guaranty, and ocean marine insurance.' These categories enumerate different kinds of insurance policies, rather than different risks. It follows that the exclusion for ocean marine insurance does not apply to employers' liability policies which incidentally cover risks associated with maritime activities.

In view of the liberal construction given LIGA's protection to the insureds of insolvent companies, it would be anomalous to allow employees to walk in and out of LIGA protection as they board or disembark from a vessel. LIGA has accepted premiums for this covered claim and cannot now deny coverage. An insurance policy which insures an employer against liability to employees is not a policy of

PROOF OF INSURANCE COVERAGE.

GARD alleges that the trial court erred in finding them liable in solido because the plaintiff failed to prove

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'ocean marine' insurance merely because it embraces some maritime risks.

In *Deshotels*, a protection and indemnity policy such as the one in this case was not considered an ocean marine policy.

In *Backhus v. Transit Cas. Co.*, supra, the court found that under the definitional statutes in the LIGA code, marine protection and indemnity policies fell within the scope of ocean marine insurance. Two members of the *Backhus* court dissented.

In *Sifers*, supra, the Fifth Circuit followed *Backhus*, and found that plaintiffs who have suffered personal injuries and defendants who have been forced to pay for those injuries have no recourse against *LIGA* pursuant to defendant's protection and indemnity policy, as those policies, under LIGA statutes, were policies of marine insurance.

More recently, in *Delaune v. Saint Marine Transp. Co.*, 749 F.Supp. 1463 (E.D.La.1990), the court held that the Louisiana Supreme Court in *Deshotels* and *Backhus* implicitly overruled the holding in *Cushing*, supra and its progeny, (including *Coleman*, supra) that under Louisiana state law a direct action may be asserted against a marine protection and indemnity policy. See also *Perreira v. Saint Marine Transp. Co.*, 1991 A.M.C. 1213, 1990 WL 299890 (E.D.La.1990).

Furthermore we note that the federal courts of Eastern District of Louisiana are not uniform in this conclusion.

In *Tassin v. Hess Marine*, 1990 W.L. 93831 (E.D.La., June 28, 1990) and in *Butler v. Western Company*, 1990 W.L. 93855 (E.D.La., June 28, 1990), the plaintiff was allowed to proceed directly against the insurer of the ship owner/employer. The court refused to apply *Backhus* and *Sifers*, citing *Cushing* and *Coleman* and held:

> There is no indication that the legislature intended that the term 'ocean marine insurance' as used in Section 22:611 should be applied to Section

any insurance coverage by GARD for Atlantia and/or MOC, and/or the terms and conditions of such coverage.

The burden of proof is on the plaintiff to establish every fact in issue which is essential to his cause of action or right of recovery, including the existence of the policy sued on, its terms and provisions, and that his claim is within its coverage. *Vallery v. All American Life Ins. Co.*, 429 So.2d 513 (La.App. 3 Cir.1983); *writ denied*, 434 So.2d 1091, 1100 (La.1983); *Gulf Wide Towing v. F.E. Wright (U.K.).*, 554 So.2d 1347 (La.App. 1 Cir.1989); *Barber v. Best*, 394 So.2d 779 (La.App. 4 Cir.1981).

A review of the record reflects that plaintiff failed to meet its burden of proof against GARD. GARD refused, in the beginning of the trial to stipulate to its policy (as is usually done) and plaintiff failed to introduce the policy into evidence or otherwise prove any terms and conditions of any such policy.

The only evidence in the record to prove the existence and extent of insurance coverage is GARD's answer to plaintiff's amended petition and Atlantia's answer to interrogatory No. 8. In its answer, GARD admitted that it provided to the M/T Atlantia, and her owner, a contract of protection and indemnity, insuring against "certain

---

655 to deprive injured persons of the right to bring a direct action against an insurance company merely because the policy in question is a "protection and indemnity' policy while we certainly are not bound by these cases emanating from the federal district courts, they add strength to our position here.

Tassin v. Hess Marine, supra.

specifically enumerated protection and indemnity risks." Atlantia, in answering interrogatory No. 8, said "Atlantia Tanker Corporation is insured by Assuranceforeningen GARD." No other evidence of the existence or extent of insurance coverage was introduced or admitted.

Since GARD admitted that some type of insurance coverage existed, the plaintiff was entitled to use this confession to prove its case. However, there is nothing in the record which proves the terms and provisions of the policy and/or that the coverage provided by the policy encompasses plaintiff's claim against Atlantia. Whereas we conclude that GARD is technically correct in requiring the plaintiff to introduce the policy and prove that it covers the negligence and damages proven, we also do not feel that equity or the ends of justice would be served by allowing GARD to escape their just liability through such technical legal maneuvering since both GARD *and* Atlantia and MOC *admitted* the existence of a policy. Accordingly, since we have ample precedence from other courts for this action, we remand the case to allow plaintiff to obtain and introduce into evidence the policy and/or evidence of its terms and provisions and the scope of its coverage, all of which can be decided by the trial judge. *Mitchell v. Wall,* 482 So.2d 817 (La.App. 4 Cir.1986); *Balehi Marine v. Fireman's Ins. Co. of Newark,* 460 So.2d 16 (La.App. 1 Cir.1984); *writ denied,* 462 So.2d 654 (La.1985); *Lucas v. Doe,* 371 So.2d 336 (La.App. 4 Cir.1979); *Carriere v. Triangle Auto SVC,* 340 So.2d 665 (La.App. 4 Cir.1977).

DENIAL OF CONTINUANCE.

On September 28, 1990, the first day of trial, GARD sought a continuance, alleging that it had no knowledge of the alleged defective condition of the control lever of the winch until September 11, 1990, when plaintiff's deposition was taken. The motion for continuance was denied and GARD applied to this Court for supervisory writs. This Court refused to issue writs and denied relief, finding no abuse of the trial court's discretion. On appeal, GARD again alleges as error the trial court's denial of its motion for continuance.

"A continuance may be granted in any case if there is good ground therefor." LSA-C.C.P. art. 1601. Such a determination is within the sound discretion of the trial court. *Ten Point Properties, LTD v. Roussel,* 506 So.2d 179 (La.App. 5 Cir. 1987).

The trial court, in denying the motion, stated that the pleadings of plaintiff raised the issue of the defective condition of the control lever, and therefore all parties had notice of this issue from the inception of the lawsuit.

Although we feel our previous denial of supervisory writs is the "law of the case" (as per our previous discussion herein), nevertheless, in an abundance of caution and fairness, we have reviewed this issue again, see no reason to change our previous position and, once more, we find no abuse of discretion in the trial court's ruling denying GARD's motion for continuance.

DISPOSITION:

In accordance with our previous discussion herein, the judgment in favor of plaintiff, and against Atlantia and MOC finding them liable, in solido, for damages incurred by plaintiff is amended to read as follows:

1.	Medical expenses, future	$ 40,000.00
2.	Past loss of net earnings	22,642.00
3.	Future loss of net earnings	$200,000.00
4.	Past loss of "found"	-0-
5.	Future loss of "found"	-0-
6.	Past physical pain and suffering	85,800.00
7.	Future physical pain and suffering	128,400.00
8.	Past mental anguish and loss of enjoyment of life	85,800.00
9.	Future mental anguish and loss of enjoyment of life	128,400.00
10.	Past Disability and disfigurement	68,640.00
	Present and Future Disability and disfigurement	102,960.00
	TOTAL	$862,642.00

The judgment is further amended to allow interest from date of judicial demand for the awards for past loss of net earnings, past physical pain and suffering, past mental anguish and loss of enjoyment of life and past disability and disfigurement. Interest is awarded from date of judgment for the awards for future medical expenses, future loss of net earnings, future physical pain and suffering, future mental anguish and loss of enjoyment of life and present and future disability and disfigurement.

The judgment in favor of plaintiff and against GARD, finding them liable, in solido, with the other defendants is set aside and the case is remanded for final outcome further proceedings in accordance with and not inconsistent with this opinion.

Each party is to bear his own costs.

AMENDED, AND AS AMENDED, AFFIRMED IN PART; SET ASIDE AND REMANDED IN PART.

APPENDIX B

The Supreme Court of the State of Louisiana

HAE WOO YOUN

VS. NO. 92-C-3018

MARITIME OVERSEAS CORP.,
ATLANTIA TANKER CORP., AND
ASSURANCEFORENGEN GARD

IN RE: Martime Overseas Corp.; Atlantia Tanker Corp.; – Defendant(s); Applying for Writ of Certiorari and/or Review; to the Court of Appeal, Fifth Circuit, Number 91-CA-0407; Parish of St. James 23rd Judicial District Court Div. "C" Number 19,400

December 21, 1992

Denied.

PFC
JCW
HTL
PH

DENNIS, J., would grant the writ.

Supreme Court of Louisiana
December 21, 1992

/s/ Frans J. Labranche, Jr.
Clerk of the Court
For the Court

The Supreme Court of the State of Louisiana

HAE WOO YOUN

VS. NO. 92-C-3017

MARITIME OVERSEAS CORP.,
ATLANTIA TANKER CORP., AND
ASSURANCEFORENGEN GARD

IN RE: Youn, Hae Woo; – Plaintiff(s); Applying for Writ of Certiorari and/or Review; to the Court of Appeal, Fifth Circuit, Number 91-CA-0407; Parish of St. James 23rd Judicial District Court Div. "C" Number 19,400

December 21, 1992

GRANTED.

(See order attached)

Supreme Court of Louisiana

December 21, 1992

/s/ Frans J. Labranche, Jr.
Clerk of Court
For the Court

The Supreme Court of the State of Louisiana

HAE WOO YOUN

VS. NO. 92-C-3017

MARITIME OVERSEAS CORP., ET AL

In re: Hae Wood Youn applying for Writ of Certiorari/ Review No. 19,400 on the docket of the 23rd Judicial District Court for the Parish of St. James, and No. 91-CA-0407 on the docket of the Court of Appeal, Fifth Circuit, State of Louisiana.

And, whereas, the Court has this date, pursuant to Article 5, Section 5, of the Constitution of Louisiana, made and issued the following order, to-wit – "It is ordered that the writ of review issue; that the District Court and the Court of Appeal send up the record in duplicate of the case; and that counsel for all parties be notified."

Now, therefore, the said District Court and the Court of Appeal is hereby commanded, in the name of the State of Louisiana and of this Honorable Court, to send up forthwith to this Court, at the City of New Orleans, the record in duplicate of the above entitled case.

Witness the Honorable Justices of the Supreme Court of the State of Louisiana on this 21st day of December, in the year of Our Lord, One Thousand, Nine Hundred and Ninety-Two.

/s/ Frans J. Labranche, Jr.
Frans J. Labranche, Jr.
Clerk of Court

Supreme Court of Louisiana

OFFICIAL DOCKET

IMPORTANT NOTICE: The Rules of Court Provide that each side will be allotted 30 minutes for oral argument in civil cases and 20 minutes in criminal and Bar discipline cases; or the case may be submitted on briefs. All parties must file briefs in every criminal case. Additional time may be allotted, but only upon request.

MONDAY, APRIL 19, 1993

10:00 A.M. SESSION

ALL COUNSEL ARE REQUESTED TO REPORT TO THE COURT CRIER FIFTEEN (15) MINUTES PRIOR TO THE COURT CONVENING

REGULAR DOCKET

(BEFORE CHIEF JUSTICE CALOGERO AND JUSTICES MARCUS, DENNIS, LEMMON, HALL, KIMBALL AND ORTIQUE)

92-KA-0968 State of Louisiana vs. Scott Juge Bourque

Thomas E. Guilbeau,
For Appellant;

Richard P. Ieyoub, Attorney General,
Bernard E. Boudreaux, Jr., District Attorney,
John P. Haney, Keith R. Comeaux,
Assistant District Attorneys;
For Appellee.

92-C-3017 Hae Woo Youn vs. Maritime Overseas Corporation, et al

ON WRIT OF REVIEW TO THE COURT OF APPEAL FIFTH CIRCUIT

Due, Smith, Caballero, Price & Guidry,
Paul H. Due;
Lewis O. Unglesby;
Gordon R. Crawford;
For Applicant;

Phelps Dunbar,
Frederick S. Kaiser, Thomas H. Kiggans,
James B. Kemp, Jr., Brian D. Wallace;
Terriberry, Carroll & Yancey,
Maurie D. Yager;
For Respondent.

POSTED: February 26, 1993

Supreme Court of Louisiana

MONDAY, APRIL 19, 1993

REGULAR DOCKET

93-CA-0332 Circle Food Stores, Inc., a/k/a Circle Food Store, Inc., on its Behalf and on Behalf of all Other Similarly Situated Class Members vs. The City of New Orleans and Paul C. Mitchell, Jr., Director of Finance of the City of New Orleans

William D. Aaron, Jr., City Attorney,
Dan Zimmerman, Brett J. Prendergast,
Assistant City Attorneys;
For Appellant;

Chaffe, McCall, Phillips, Toler & Sarpy,
William F. Grace, Jr., Andrew Rinker, Jr.,

Charles P. Blanchard;
For Appellee.

2:00 P.M. SESSION

ALL COUNSEL ARE REQUESTED TO REPORT TO THE COURT CRIER FIFTEEN (15) MINUTES PRIOR TO THE COURT CONVENING

REGULAR DOCKET

(BEFORE CHIEF JUSTICE CALOGERO AND JUSTICES MARCUS, DENNIS, WATSON, LEMMON, HALL AND ORTIQUE)

92-C-2957 Mrs. Vergie Washington vs. Mary Damion Savoie, et al C/W Alice Brown vs. State Farm Mutual Insurance Co., et al C/W Julia Adams, Wife of and Louis Adams, Jr. vs. Tani Thanh Le, et al

ON WRIT OF REVIEW TO THE COURT OF APPEAL FOURTH CIRCUIT

Robert M. Hearin, Jr.;
Gerald J. Leydecker;
Rene D. Lovelace;
Miles Mark;
Lobman, Carnahan & Batt,
Lane A. Schaffer;
For Applicant;

Michael K. Springmann;
Preston G. Sutherland;
Turner, Young, Hebbler & Babin,
Coleman T. Organ;
Roger J. Larue, Jr.;
Kiefer, Augustin & Laventhal,
Nathan D. Laventhal;
For Respondent.

Supreme Court of Louisiana

MONDAY, APRIL 19, 1993

REGULAR DOCKET

92-C-3081 Lawrence Pinkins, Sr. vs. Cardinal Wholesale Supply, Inc., et al

ON WRIT OF REVIEW TO THE COURT OF APPEAL FIFTH CIRCUIT

Weigand, Levenson & Costa,
Richard A. Weigand, Dee O. Andrews;
For Applicant;

Windhorst, Gaudry, Ranson, Higgins & Gremillion,
Steven D. Oliver;
For Respondent.

92-CC-3244 Alma Dale Campbell vs. Pasternack Holding Co.,. Inc.

ON SUPERVISORY WRITS

Smith, Taliaffero, Siebert & Purvis,
Josiah W. Siebert, III;
For Applicant;

Colhoun & Murray,
Nathan M. Calhoun;
Gist, Methvin, Hughes & Munsterman,
Dewitt T. Methvin, Jr.;
Norman Magee;
Harry Lossin, Sr.;
For Respondent.

APPENDIX C

[Filed for Record St. James Parish, La
Dec. 27, 1989 – 9:10 a.m.]

HAE WOO YOUN	23RD JUDICIAL DISTRICT COURT
VS. NO. 19,400	PARISH OF ST. JAMES
MARITIME OVERSEAS CORPORATION, ET AL	STATE OF LOUISIANA
FILED: Dec. 27, 1989	/s/ Edmond E. Kinler CLERK OF COURT

REASONS FOR JUDGMENT ON MOTION TO STRIKE DEMANDS

Louisiana Code of Civil Procedure article 1732 (6) provides as follows:

> "A trial by jury shall not be available in:
>
> (6) A suit on an admiralty or general maritime claim under federal law that is brought in state court under a federal "saving to suitors" clause, if the plaintiff has designated that suit as an admiralty or general maritime claim."

This suit was filed on July 10, 1989, and therefore after the effective date of the 1988 amendment adding subsection (6) to article 1732. There is no issue in this case, accordingly, concerning retroactive applicability of the aforementioned codal amendment.

The obvious purpose of this legislation was to accord plaintiff bringing one of these claims in state court under the "saving to suitors" clause the same opportunity to control whether or not trial by jury could occur, as plaintiff in such a claim would enjoy in federal court by

designating the claim, including a Jones Act claim, an admiralty or general maritime claim for purposes of rule 9(h) of the Federal Rules of Civil Procedure.

The Jones Act, 46 U.S.C. 688, by its very terms makes it clear that the initial right to decide whether the case shall or shall not be tried by a jury rests exclusively with the plaintiff:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

The Court cannot accept defendant's argument, asserted in brief, that simply because plaintiff in this case has stated a cause of action under the Jones Act, as well as under general maritime law for unseaworthiness, this case falls outside of the scope of subsection (6) of article 1732. Had this case been filed in federal court, rather than in state court, and had plaintiff asserted a cause of action solely under the Jones Act, plaintiff would still have been

able to deny defendant any right to trial by jury, simply by designating his exclusive Jones Act claim in federal court as an "admiralty or general maritime claim" under Rule 9(h). Plaintiff is now accorded those same rights in state court in such a case, even where the Jones Act is invoked, under subsection (6) of article 1732.

It has been clearly recognized in applicable Fifth Circuit Court of Appeals jurisprudence that the Jones Act gives only the seaman-plaintiff the right to choose a jury trial:

> "As we have noted, the Jones Act gives only the seaman-plaintiff the right to choose a jury trial." *Rachal v. Ingram Corporation*, 795 F.2d 1210, 1215 (5th Cir. 1986).

The Court is aware of the dictum contained in the Forth Circiut [sic] opinion in *Gauchet v. Chevron U.S.A., Inc.*, 541 So.2d 272, 273 (La. App. 4th Cir. 1989), heavily relied upon by defendant herein: "The Jones Act claim is not an action in admiralty, it is an action at law with the right to trial by jury. 46 U.S.C. App. Sec. 688. Therefore art. 1732, does not restrict the right to trial by jury in Jones Act or C.C. art. 2315 claims."

With all due respect, the Court does not agreee [sic] with the foregoing pronouncement. *Gauchet* was factually analogous to *Johnson v. Penrod Drilling Company*, 469 F.2d 897 (5th Cir. 1972), in that in both cases the respective plaintiffs originally asked for trial by jury and there was existence at the commencement of the suit of diversity of citizenship. Defendant Chevron in *Gauchet*, accordingly was actually entitled to trial by jury because plaintiffs did not originally designate the *Gauchet* suit as an admiralty

or general maritime claim. Since no such original designation occurred, once plaintiffs in *Gauchet* thereafter sought to change posture and seek to have no jury trial, they were met with the same right to jury trial which would have existed under *Johnson v. Penrod Drilling Company,* namely, the independent basis of diversity of citizenship. It is obvious from a reading of *Gauchet* that the plaintiffs, as heirs of the decedent, are diverse in citizenship from *Chevron U.S.A., Inc.*

Additionally, *Gauchet* involved an attempted retroactive applicability of Section (6) of article 1732.

The instant case, however, is more closely analogous to *Rachal v. Ingram Corporation, supra,* in that in both the instant case and in *Rachal,* at least when the suit commenced, there was no independent diversity of citizenship. The instant case, however, is distinguishable, however, from *Rachal* in that in the instant case there was never any request by plaintiff for trial by jury, and, therefore, no subsequent change in posture.

The reason, of course, as to why there is no diversity of citizenship in the instant case is because all of the defendants are not exclusively American in citizenship. In the instant case defendant has furnished the affidavit of Salvatore Fuca, to which was attached a copy of the agency agreement between Atlantia Tanker Corporation and Maritime Overseas Corporation. This document states in the preamble that Atlantia Tanker Corporation is a Liberian corporation. Even if, therefore the principal place of business for Atlantia Tanker Corporation is the state of New York, as claimed by plaintiff, there would still not be the requisite complete diversity of citizenship,

because Atlantia Tanker Corporation, while it might qualify as a citizen of the state of New York, if indeed New York is its principal place of business in the world, nevertheless Atlantia Tanker Corporation is still a Liberian corporation, thus defeating complete diversity by virtue of having an alien plaintiff and a corporation, at least one of the citizenships of which is also alien. See *Chick Kam Choo v. Exxon Corporation*, 764 F.2d 1148 (1985).

The First Circuit recently recognized that, "jurisprudentially, it had been determined that, under the "Savings to Suitors" clause of 28 U.S.C.A. 1333, parties had a right to trial by jury in state court if the plaintiff could have brought a general civil suit in federal civil district court because of complete diversity of citizenship and if the amount in question exceeded the amount required for federal court jurisdiction. *Lavergne v. Western Company of North America, Inc.*, 371 So.2d 807 (La. 1979)." *Ford v. McDermott Incorporated*, 543 So.2d 1135, 1136 (La. App. 1st Cir. 1989).

It would be anomalous indeed to interpret subsection (6) of article 1732 as not applying to a Jones Act suit brought in state court under the "saving to suitors" clause, and thereby hold that a Jones Act plaintiff would have less right to determine whether or not a trial in state court would be without a jury than would the same plaintiff have if he stated his cause of action strictly in unseaworthiness under admiralty or general maritime law, or if the plaintiff were not a Jones Act seaman, but were instead a general maritime tort claimant who was bringing a third party action against a defendant, such as in a vessel collision case. After all, as previously stated,

the Jones Act gives the option to choose trial by jury exclusively to the plaintiff-seaman.

Nor is the Court impressed with defendants' argument that because the legislature in the 1989 session passed a bill which amended subsection (6) of article 1732 so as to specifically include the Jones Act by name, which bill was then vetoed by Governor Roemer, that that legislative development supports the conclusion that a Jones Act claim is not included within the phraseology, "an admiralty or general maritime claim under federal law." As was correctly pointed out by plaintiff's counsel at oral argument, the fact that the Louisiana Legislature in extraordinary session passed a bill stating that the Louisiana Product Liability law was not retroactive, only to have that bill likewise vetoed by Governor Roemer, did not preclude the Second Circuit from holding that the Louisiana Product Liability law was indeed not retroactive, *McCoy v. Otis Elevator Company*, 546 So.2d 229 (La. App. 2d Cir. 1989).

The Court will grant plaintiff's motion to strike.

HAE WOO YOUN
VS. NO. 19,400
MARITIME OVERSEAS CORPORATION, ET AL
FILED: Dec. 27, 1989

23RD JUDICIAL DISTRICT COURT
PARISH OF ST. JAMES
STATE OF LOUISIANA
/s/ Edmond E. Kinler
CLERK OF COURT

JUDGMENT ON MOTIONS TO STRIKE

(Dec. 27, 1989)

Before the Court for adjudication is the motion by plaintiff to strike demands for jury trial made by defendants Atlantia Tanker corporation and Maritime Overseas Corporation. After considering the pleadings, the evidence and the arguments of counsel, the law and the evidence being in favor thereof, in accordance with written reasons for judgment entered of record:

IT IS ORDERED, ADJUDGED AND DECREED that the motion of plaintiff to strike demands for jury trial made by defendants Atlantia Tanker Corporation and Maritime Overseas Corporation be and the same is hereby granted.

JUDGMENT RENDERED AND SIGNED in Gonzales, Louisiana, this 19th day of December, 1989.

/s/ John L. Goldsmith
John L. Goldsmith, Judge
23rd Judicial
District Court

I hereby certify that the above and foregoing is a true and correct copy of the original on file and record in my office.

/s/ Gene H. Russell
Dty. Clerk of Court &
Ex-Officio Recorder
Parish of St. James, Convent, La.

The Clerk of Court is hereby instructed to file these Reasons for Judgment in the minutes of this Court and to notify Mr. Paul Due', 8201 Jefferson Highway, Baton Rouge, Louisiana 70809, to prepare and forward a judgment for execution in accordance herewith.

Gonzales, Louisiana, this 19th day of December, 1989.

/s/ John L. Goldsmith
John L. Goldsmith, Judge
23rd Judicial
District Court

I hereby certify that the above and foregoing is a true and correct copy of the original on file and record in my office.
/s/ Gene H. Russell
Dty. Clerk of Court &
Ex-Officio Recorder
Parish of St. James, Convent, La.

Application for

No. '90 -C- -90

COURT OF APPEAL, FIFTH CIRCUIT

STATE OF LOUISIANA

FEB - 5 1990

/s/ Illegible
Dty, Clerk

HAE WOO YOUN

VERSUS

MARITIME OVERSEAS CORPORATION AND ATLANTIA TANKER CORPORATION

In Re MARITIME OVERSEAS CORPORATION AND ATLANTIA TANKER CORPORATION

Applying for SUPERVISORY AND REMEDIAL WRITS OF CERTIORARI, REVIEW, MANDAMUS AND/OR PROHIBITION AND FOR A STAY ORDER DIRECTED TO THE HONORABLE JOHN L. GOLDSMITH, JUDGE 23RD J.D.C., PARISH OF ST. JAMES, STATE OF LOUISIANA, DIVISION "C", NO: 19,400

Clayton G. Ramsey
James B. Kemp, Jr.
Attorneys at Law
400 Poydras St., 30th Floor
New Orleans, Louisiana 70130-3245
(504) 566-1311

Attorneys for Relator

Paul H. Due'
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(504) 929-7481

Attorneys for Respondent

Lewis O. Unglesby
Attorney at Law
246 Napoleon Street
Baton Rouge, Louisiana 70802
(504) 387-0120

Gordon R. Crawford
Attorney at Law
324 E. Worthy
Gonzales, Louisiana 70737
(504) 647-2881

WRIT DENIED:

I see no reason to exercise our supervisory jurisdiction in this matter.

/s/ T.C.W., Jr.
JUDGE THOMAS C. WICKER, JR.

JJ. KLIEBERT AND GRISBAUM CONCURRING IN THE DENIAL OF THE WRIT

A Jones Act claim may be brought as either a law claim or an admiralty claim. Plaintiff's amended petition specifically designates his claim as an admiralty claim, thereby eliminating any right to a jury trial. See La. C.C.P. art. 1732(6), FRCP 9(h), and FRCP 38(e).

/s/ T.J.K.
JUDGE THOMAS J. KLIEBERT
/s/ C.G.
JUDGE CHARLES GRISBAUM, JR.

Gretna, Louisiana this 6th day of March, 1990.

HAE WOO YOUN

v.

MARITIME OVERSEAS CORPORATION and Atlantia Tanker Corporation.

No. 90-CC-0528.

Supreme Court of Louisiana.

April 16, 1990.

In re Maritime Overseas Corp.; Atlantia Tanker Corp.; – Defendant(s); applying for writ of certiorari and/or review; Parish of St. James, 23rd Judicial District Court, Div. "C", No. 19400; to the Court of Appeal, Fifth Circuit, No. 90-CW-0090.

Denied.

APPENDIX D

[Filed for Record
St. James Parish, La
Dec. 17, 1990 – 2:56 p.m.]

HAE WOO YOUN	:	NUMBER 19,400, DIV. "C"
VERSUS	:	23RD JUDICIAL DISTRICT COURT
MARITIME OVERSEAS CORPORATION AND ATLANTIA TANKER CORPORATION	:	PARISH OF ST. JAMES
	:	STATE OF LOUISIANA

JUDGMENT

This matter came on for trial on ther [sic] merits on September 28, 1990. Present:

> Paul H. Due' and Lewis Unglesby, attorneys for plaintiff; Scott Kaiser and Thomas Kiggans on behalf of defendants, Maritime Overseas Corporation and Atlantia Tanker Corporation; and Maurie D. Yager on behalf of defendant, Assuranceforeningen Gard.

Considering the evidence, the briefs of counsel and the applicable law:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiff HAE WOO YOUN and against defendants, MARITIME OVERSEAS CORPORATION, ATLANTIA TANKER CORPORATION and ASSURANCEFORENINGEN GARD, in solido, in the amount of $1,703,864.00, together with interest at the Louisiana legal rate from the date of judicial demand until paid; plus all costs of these proceedings, including

all clerk of court's costs and the following special items of costs:

Inspection of vessel in Italy	$6,294.22
Expert witness fee of Captain George Blann	$4,462.50
Expert witness fee of Dr. G. Randolph Rice	$1,622.50
Transcript of depositions of Capt. Choi, Mr. Heu and Q/M. Choi, introduced into evidence	$ 334.00
Bill for hospital record of OLOL	$ 295.11
TOTAL	$13,008.33

JUDGMENT READ, RENDERED AND SIGNED this 17th day of December, 1990.

/s/ John L. Goldsmith
JUDGE,
23RD JUDICIAL
DISTRICT COURT

Form submitted by:

Paul H. Due', Bar Roll #5120
DUE', SMITH, CABALLERO & PRICE
8201 Jefferson Highway
Baton Rouge, LA 70809
Telpephone [sic]: 504 929-7481

Hae Woo Youn
vs. No. 19,400
Maritime Overseas Corporation State of Louisiana and Atlantia Tanker Corp., et al

23rd Judicial
District Court
Parish of St. James

Filed: December 20, 1990 /s/ Jan Donaldso
Clerk of Court

REASONS FOR JUDGMENT

This matter came before the Court for trial Friday, September 28, 1990.

Present in Court: The firm of Phelps-Dunbar, representing Maritime Overseas Corporation and Atlantia Tanker Corporation; M. D. Yager, representing Assuranceforeningen Gard, Paul Due' and Lewis Unglesby representing the plaintiff, Hae Woo Youn.

The matter had been set for trial, but the Friday before the scheduled trial date, the Assuranceforeningen Gard, MOC, and Atlanta [sic] filed a removal petition. This petition was filed without notice to the Court. Remand was granted on September 27, 1990, by the Eastern District, and the trial commenced on Friday, September 28, 1990.

At the commencement of trial, the defendant, Assuranceforeningen Gard, again requested a continuance and re-urged its claims of lack of jurisdiction. The Court denied the relief, writs were taken to the Fifth Circuit which were also denied during the course of the trial that day. Counsel for Assuranceforeningen Gard participated

in the trial, filed pleadings, including an answer, questioned witnesses, and adopted the witnesses provided by its insured, Maritime Overseas Corporation and Atlantia Tanker Corporation. Furthermore, counsel for Assuranceforeningen Gard advised the Court on the record, that it provided the insurance coverage to the ship for the incident involved.

The issues to be decided by the Court are the unseaworthiness of the M.V. Atlantia, the negligence of defendants, what contribution those made to the injuries of plaintiff, plaintiff's contributory or comparative negligence, general damages, and the applicability of punitive damages.

The Court is convinced that the defendant MOC, the controlling force over the plaintiff, is plaintiff's employer. This court is further convinced after review of the evidence, pleadings, and the statements in Court, that Assuranceforeningen Gard provides insurance for any damages which may be assessed.

The accident happened because the boat was in an unseaworthy condition, and because of negligence. The winch control lever had been broken for some period of time and did not operate. Accepting the testimony in the light most favorable to the defendants, the court finds that the winch lever was dysfunctional. Furthermore, the lever could easily and should easily have been repaired during the six months that it was broken while the boat was in American waters. The crew was non-trained. The Court is impressed by the testimony of all crew members that there were no safety manuals written in Korean, that there was no training provided for any crew members,

and that the procedure of MOC was to hire the Korean crew member and put him on the boat. On-the-job training can be expected to lead to accidents. Defendants were negligent. They allowed the crew to use the steam valve because the winch lever did not work. The Court finds that the use of the steam valve is not a safe method, and is not the method intended in the design of the ship for the use of the winch. Mr. Heu released too much steam, accelerating the speed of the winch, leading to the accident. The negligence of a crew member in employing a method approved by his employer is actionable. Choi was ordered to engage the crane reel stopper in the event that the winch control lever began to operate out of control. Choi, because he was afraid, and was being peppered by debris coming off the cable, ran from his post. This placed Bosun Youn in the predicament of having no stopper. At the time that Choi abandons his post, the winch is out of control, Heu has over-accelerated the steam, and the crane boom is beginning to fall. Youn attempts to take action to preserve his employer's property and to save the lives of his fellow workers. The winch cable snaps Youn's leg, creating his injury.

The Court resolves this as a simple matter. The Court finds that there is gross negligence in regard to the failure of MOC and Atlantia to provide a seaworthy vessel, and to repair a known broken piece of equipment. The burden of the plaintiff is light. A vessel owner/employer is deemed negligent if it fails to exercise reasonable care to maintain a reasonably safe work environment. In this case, the evidence overwhelmingly preponderates in favor of plaintiff and against defendant.

The Court finds as a fact, that the crew was not properly trained in the operation of the winch. The Court finds as a fact, that there was no training to the crew as to what action to take in the event the winch became out of control as occurred here, and further, that because the vessel owner failed to repair the broken winch, or to employ an automatic stopper, it was foreseeable that an event such as this would occur. The court finds that at no time, did any superior member of the Atlantia crew, or MOC Corporation, require Youn or anyone else to use any alternative method in winding the winch.

Defendants argue that the use of the gypsy head to wind the excess cable onto the winch drum, would avoid the accident. The defendants suggest that all slack between the crane reel and winch drum should be taken in. The Court was impressed by the fact that the actions taken by Youn appeared to be commonplace, and further that the captain of the boat had no knowledge as to what methodology was correct. The captain admits that they were in a substantial hurry because the pilot had come to move the boat and that it was Youn's job to get the crane in a position to shove off. Youn testified and his crew members support the idea, that the method he was using was the most efficient, and that they had never been instructed to avoid that method nor of any safety hazards created by the method.

The court is not impressed by the defendants' efforts to blame the accident on Youn's use of the method employed by him, instead of their failure to train their crew, and to repair their broken equipment which they provided to Youn.

The Court is not impressed by the claim that Youn used a "shortout" in view of the Captain's testimony that they were in a hurry to take off, and all witnesses' testimony that Youn was an experienced, knowledgeable bosun. The Court finds that had the winch been repaired, or had the untrained crew members stayed at their post, or had the steam valve not been overcharged, the accident would have been avoided. All this is directly placed at the feet of the defendants. Furthermore, from reviewing the evidence, including the photographs, the Court does not believe that it would be practical or probable, that all of the line could be placed on the gypsy head.

Defendants' reliance on certain OSHA regulations, mentioned for the first time by defendants in post-trial briefing, is unwarranted, since OSHA regulations are not applicable to working conditions of seamen on vessels such as the M. V. Atlantia. *Clary v. Ocean Drilling and Exploration Company,* 609 Fed.2d 1121 (5th Cir.1980).

The Court does not find Mr. Youn contributorily negligent. He acted in accordance with his training, he was given inadequately trained helpers, one of whom abandoned his post, and he was required to work with defective equipment. The Court is well aware of the pressure placed upon a foreign seaman to do the job required, and the inability of a seaman to refuse his duties. The Court furthers [sic] notes the substantial conflicts in the testimony of the crew between their discovery depositions taken by the plaintiff and their trial depositions several days later. The Court recognizes in those depositions that the crew members were kept under the total control of the defendants, that certain relevant crew members were present in New Orleans in order to provide information

to defense counsel, and at least one was then sent to Tokyo rather than provided for testimony. The record reflects that Port Captain Williams made an inspection of the vessel right after the accident, and condemned the actions of the crew and recognized the failure of the equipment. This information was not provided to plaintiff until the eve of trial, and then only inadvertently. The Court, in evaluating the evidence, believes the statements of the crew members taken in the discovery depositions, believes the statements of Captain Williams in his June inspection report, accepts the testimony of Captain George Blann as more reasonable based on facts and evaluations consistent with accepted maritime safety practices, and finds evidence in favor of Youn on the issues of unseaworthiness, negligence, and lack of comparative negligence overwhelming.

1.	Medical expenses, future	$ 40,000.00
2.	Past loss of net earnings	$ 22,642.00
3.	Future loss of net earnings	$200,000.00
4.	Past loss of found	$ 3,748.00
5.	Future loss of found	$ 37,474.00
6.	Past physical pain and suffering	$200,000.00
7.	Future physical pain and suffering	$300,000.00
8.	Past mental anguish and loss of enjoyment of life	$200,000.00
9.	Future mental anguish and loss of enjoyment of life	$300,000.00
10.	Disability and disfigurement	$400,000.00

These awards are more than deserved. The plaintiff's left leg is nothing more than a stick connecting his thigh

bone to his ankle. The scarring demonstrated in the pictures represents a river of gruesome tattoos which encompass and circle the entire leg, from groin to foot. Plaintiff's leg is embroidered with an ugly snake-like appearance. The Court has never seen such a dismaying scene. The Court was most impressed with plaintiff's sincerity and obvious heartache over his condition. Plaintiff's leg is useless for anything other than support. Dr. Davis described the skin over the bone as a paper thin leg. Plaintiff is in constant jeopardy of any intrusion into the leg, cutting the vessel, and placing his life at risk. There are no muscles, meat, nor fatty tissue in plaintiff's left thigh. Plaintiff's leg swells constantly, will never improve, and is expected to continue on a constantly downward course. Plaintiff will need future medical expenses because the vessels grafted in his leg will wear out over time. This will require at least two more surgeries based on plaintiff's life span. The Court does not see how plaintiff can accomplish any type of future work other than desk duty for which he appears both situationally and educationally unsuited. The plaintiff is totally and permanently disabled, can never return to any kind of physical activity, and must drag around with him, a constant reminder of this event. The impression from plaintiff's testimony, and viewing photographs of his existing condition, persuades the Court that plaintiff is a depressed, sorrowful, embarrassed, gentlemen who had previously led an active, healthy, and vital existence. Plaintiff is described as a model patient who was most grateful to his American doctors for saving his life. Modern medicine can only do so much, however, and plaintiff's discussion of his wife's reaction when observing his

leg upon his return home and to this date, persuades the Court that the disfigurement award is required. Plaintiff leads a life of embarrassment, pain and shame as a result of the injury. He will have lifetime problems. The independent medical exam ordered by the defendants reflects 90 to 100% strength loss in the left leg, and is described by their doctor, as a "near traumatic amputation of the left lower extremity." Plaintiff has a significant whole body impairment rating.

For over an hour plaintiff lay on the deck of the ship where he had worked with pride and dignity, fearful that he would never again stand on his own two feet. The obvious pain described by Capt. Choi was immense both while waiting for the helicopter, and at the hospital. Plaintiff was placed under the most powerful sedatives for most of his hospital stay. As recovery occurred, pain increased with the regeneration of the nerves. Today plaintiff has limited motion, no vitality, and no capacity to exercise or use the leg because of its delicate nature. He lives in constant apprehension of further injury. He has legitimate concerns over blood clots, loss of circulation and graft failures. He lives in Korea, and wet and cold weather create additional problems in his thigh area which the doctors describe as expectable and severe.

The lost wages and future medical are specific. The Court finds that the plaintiff carried his burden of proof on the issue of "found" through testimony that the plaintiff was provided with clothing and meals everyday which would equate to at least $10.00 per day in value. The Court takes judicial notice of the costs of such matters.

This matter has presented this Court with no doubt whatsoever as to a proper verdict up to the remaining question of punitive damages. In this proceeding punitive damages are clearly available. The computation of punitive damages comes through no precise measure, and no particular multiplier is required. *Stokes v. Delcambre,* 710 Fed. 2d 1120 (5th Cir. 1983). The Fifth Circuit has noted that treble damage schemes are acceptable as a method of applying punitive damages, and further that other higher and lower multipliers are acceptable. In *Matter of P & E Boat Rentals, Inc.,* 872 Fed. 2d 642 (5th Cir. 1989), the Fifth Circuit adopted the rule of *U.S. Steel Corporation v. Fuhrman,* 407 Fed. 2d 1143 (6th Cir. 1969). The Rule provides that the isolated action of a loser level employee, or even a captain, does not support a finding that the corporation or owners are responsible. Stated precisely, the *P & E* rule which this Court feels applicable in this circuit is:

> "We think the better rule is that punitive damages are not recoverable against the owner of a vessel for the act of the master unless it can be shown that the owner authorized or ratified the acts of the master either before or after the accident. Punitive damages also may be recoverable if the acts committed were those of an unfit master and the owner was reckless in employing him." 872 Fed. 2d 652.

The Court also feels that *Self v. Great Lakes Dredge and Dock Company,* 832 Fed. 2d 1540 (11th Cir. 1987), must be considered herein. The Eleventh Circuit was broken up from the Fifth Circuit, and "Eleventh Circuit Law", like the "Fifth Circuit law", is of special consideration for this Court. Stated precisely the *Self* rule is:

> "Punitive damages should be available in cases where the ship owner wilfully violated the duty to maintain a safe and seaworthy ship, as was found to exist on the part of the Great Lakes by the district court, or where the ship owners acts or failure to act recklessly increase the danger of a disaster."

It is this Court's considered opinion and a specific finding herein that based upon its factual determinations under the *Self* standard punitive damages are due. It is this Court's further considered opinion and a specific finding herein that based upon its factual determinations under the *P & E* standard punitive are not due. The Court cannot contemplate a more compelling example of a need for establishment of a true standard which can be applied uniformly.

While the Court will state for the record that it feels the *Self* standard the more preferable under the Court's understanding of proper judicial application of jurisprudence the Court will reluctantly consider itself bound by the *P & E* standard set forth by the Fifth Circuit and deny punitive damages herein.

The Court taxes all costs against the defendants, including the following expenses:

$6,294.22 – Vessel Inspection by Captain Blann
$4,462.50 – Expert witness fee, Captain Blann
$1,622.50 – Dr. G. Randolph Rice
$ 295.11 – Smart Corporation
$ 334.00 – Deposition costs

The Court further awards plaintiff the following medical expenses as costs necessary for the treating physicians to arrive at their final opinions:

$ 311.00 – Bone and Joint Clinic
(Dr. Joe Morgan)
$ 50.00 – Plastic Surgery Group
(Dr. Martin Bell)
$ 50.00 – CVT Surgical Center
(Dr. David Davis)

The Clerk of Court is hereby instructed to file these Reasons for Judgment in the minutes of this Court and to notify Mr. Paul Dué, 8201 Jefferson Highway, Baton Ruge [sic], Louisiana 70809, to prepare and forward a judgment for execution in accordance herewith.

Gonzales, Louisiana this 17th day of December, 1990.

/s/ John L. Goldsmith
John L. Goldsmith, Judge
23rd Judicial
District Court

APPENDIX E

[Filed For Record
St. James Parish, LA
July 10, 1989 – 11:23 a.m.]

HAE WOO YOUN	:	NUMBER 19400
VERSUS	:	DIVISION ___
MARITIME OVERSEAS CORPORATION AND ATLANTIA TANKER CORPORATION	:	23RD JUDICIAL DISTRICT COURT
	:	PARISH OF ST. JAMES
FILED: July 10, 1989	:	STATE OF LOUISIANA
	:	/s/ Edmond E. Kinler CLERK

PETITION FOR DAMAGES

The petition for HAE WOO YOUN, of legal age and domicile in Suwon, Kyongkido, Korea, with respect represents:

1.

This is a case under the Jones Act, 46 U.S.C. § 688, and the General Maritime law, brought in this Honorable Court under the saving to Suitors Clause, 28 U.S.C. § 1333.

2.

The following parties are made defendants herein:

A. MARITIME OVERSEAS CORPORATION, a foreign corporation organized under the laws of the state of New York, with its

principal place of business in the state of New York, the office address of which is 511 5th Avenue, New York, New York 10017, not licensed to do business in the state of Louisiana, but in fact doing substantial business within the state of Louisiana and deriving substantial revenue from such business activity within the state of Louisiana, and thus amenable to exercise by this Honorable Court of personal jurisdiction over it pursuant to the provisions of the Louisiana Long Arm Statute, La.R.S. 13:3201, et seq.; and

B. ATLANTIA TANKER CORPORATION, a foreign corporation organized under the laws of the state of New York, with its principal place of business in the state of New York, the office address of which is 511 5th Avenue, New York, New York 10017, not licensed to do business in the state of Louisiana, but in fact doing substantial business within the state of Louisiana and deriving substantial revenue from such business activity within the state of Louisiana, and thus amenable to exercise by this Honorable Court of personal jurisdiction over it pursuant to the provisions of the Louisiana Long Arm Statute, La.R.S. 13:3201, et seq.

3.

At all pertinent times, plaintiff was employed as the boatswain aboard the M/V ATLANTIA owned by ATLANTIA TANKER CORPORATION and operated by

plaintiff's Jones Act employers, MARITIME OVERSEAS CORPORATION.

4.

On or about May 23, 1989, while the M/V ATLANTIA was at the St. James Port No. 1 Pier located on the Mississippi River in St. James Parish, Louisiana, plaintiff sustained severe and permanently disabling injuries to his left leg and other parts of his body when a cable which was being winched by the vessel started spinning and whipping out of control, catching plaintiff's leg.

5.

The incident sued on herein occurred because of negligence of other crew members, namely, the winchman and the stopper, who failed to follow plaintiff's instructions, plaintiff being their supervisor, that the assigned operation be performed slowly and safely. Instead, these employees allowed the cable and winch to get out of control causing the injury and resulting damages sued for herein. These employees also failed to follow the express instructions of plaintiff that the stopper be utilized so as to stop the motion of the winch control.

6.

Plaintiff accordingly avers entitlement to recover damages sued for herein from defendants based on the aforementioned negligence of the aforementioned crew members, which negligence is actionable under the Jones

Act, 46 U.S.C. § 688, and which negligence caused the injuries and damages sued on herein.

7.

Plaintiff further avers entitlement to recover damages sued for herein based on the unseaworthiness of the vessel, predicated on unseaworthy winch and related equipment which caused or contributed to the injury and damages sued on herein.

8.

As a result of the incident sued on herein, plaintiff had to be hospitalized in Baton Rouge, Louisiana, where he still remains, has had to undergo numerous surgical procedures, was in fear of having to undergo surgical amputation of his leg, has sustained permanent injury to the leg, as well as permanent scarring and disfigurement, has sustained excruciating pain and suffering and mental anguish and distress from which he will suffer for the indefinite future, has sustained loss earnings, and loss or impairment of future earning capacity, as well as needed future medical expenses and future rehabilitation costs.

9.

Plaintiff accordingly avers entitlement to recover compensatory damages in accordance with the law and the evidence as may be reasonable in the premises, for permanent disability, disfigurement and scarring, past and future pain and suffering, past and future mental

anguish and distress, loss earnings and loss or impairment of future earning capacity and future medical expenses and rehabilitation costs.

WHEREFORE, Plaintiff prays that after due proceedings are had, there be judgment in favor of plaintiff, HAE WOO YOUN, and against defendants, MARITIME OVERSEAS CORPORATION and ATLANTIA TANKER CORPORATION, in solido, for damages as may be reasonable in the premises in accordance with the law and the evidence, with prejudgment interest on all awards of damage from date of the accident, or, alternatively, from date of judicial demand until date of judgment, and for post judgment interest until date of payment, and for all costs of these proceedings.

Attorneys for Plaintiff:

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Of counsel:

GORDON R. CRAWFORD &
ASSOCIATES

By: /s/ Gordon R. Crawford
Gordon R. Crawford,
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324 E. Worthy
Gonzales, LA 70737
Telephone: 504 647-2881

SERVICE INFORMATION:

Defendant, MARITIME OVERSEAS CORPORATION, is to be served through the Louisiana Long Arm Statute, La.R.S. 13:3201, et seq.

Defendant, ATLANTIA TANKER CORPORATION, is to be served through the Louisiana Long Arm Statute, La.R.S. 13:3201, et seq.

[Filed For Record
St. James Parish, LA
July 10, 1989 – 11:23 a.m.]

HAE WOO YOUN	:	NUMBER 19400
VERSUS	:	DIVISION ___
MARITIME OVERSEAS CORPORATION AND ATLANTIA TANKER CORPORATION	:	23RD JUDICIAL DISTRICT COURT
	:	PARISH OF ST. JAMES
	:	STATE OF LOUISIANA
FILED: July 10, 1989	:	/s/ Edmond E. Kinler CLERK

MOTION FOR LEAVE OF COURT TO FILE INTERROGATORIES IN EXCESS OF LIMITATION

NOW INTO COURT, through undersigned counsel, comes HAE WOO YOUN, plaintiff in the above numbered and entitled proceeding, and moves the Court for issuance of an order authorizing plaintiff to propound to defendants, MARITIME OVERSEAS CORPORATION and ATLANTIA TANKER CORPORATION, interrogatories in excess of the limit provided by Local Rule XX for the following reasons:

1.

Plaintiff anticipates that defendants, MARITIME OVERSEAS CORPORATION and ATLANTIA TANKER CORPORATION, will assert declinatory exceptions urging lack of personal jurisdiction and pleas of forum non conveniens.

2.

In order to properly defend against any such defensive pleas, it is necessary that plaintiff be provided full discovery to demonstrate jurisdictional contacts on the part of defendants with the state of Louisiana.

3.

It is not possible for plaintiff to undertake appropriate discovery by propounding only the number of interrogatories permitted by Local Rule XX, i.e., twenty-five (25). Local Rule XX, however, does provide for the Court

granting a litigant the right to propound additional interrogatories when appropriate in a particular case. Plaintiff respectfully submits that this is such a situation where such court authority should be granted, and attaches hereto said proposed interrogatories.

WHEREFORE, Plaintiff, HAE WOO YOUN, prays that the Court grant his motion to file interrogatories numbering in excess of those permitted by Local Rule XX, and permit Mover to propound to defendants, MARITIME OVERSEAS CORPORATION and ATLANTIA TANKER CORPORATION, the attached set of interrogatories.

Respectfully submitted by
Attorneys for Plaintiff:

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Of counsel:

By: /s/ Gordon R. Crawford
Gordon R. Crawford,
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GORDON R. CRAWFORD &
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324 E. Worthy
Gonzales, LA 70737
Telephone: 504 647-2881

ORDER

Considering the foregoing Motion and the Court finding good cause therefore:

IT IS ORDERED that plaintiff, HAE WOO YOUN, be and he is hereby authorized to file and propound to defendants, MARITIME OVERSEAS CORPORATION and ATLANTIA TANKER CORPORATION, the attached interrogatories numbering in excess of twenty-five (25) as permitted by Local Rule XX.

ORDERED RENDERED AND SIGNED at Gonzales, Louisiana, on this 10th day of July, 1989.

/s/ John L. Goldsmith
JUDGE, 23RD JUDICIAL
DISTRICT COURT

SERVICE INFORMATION:

Defendant, MARITIME OVERSEAS CORPORATION, is to be served through the Louisiana Long Arm Statute, La.R.S. 13:3201, et seq.

Defendant, ATLANTIA TANKER CORPORATION, is to be served through the Louisiana Long Arm Statute, La.R.S. 13:3201, et seq.

APPENDIX F

HAE WOO YOUN	23RD JUDICIAL DISTRICT COURT
V. NO. 19,400	
MARITIME OVERSEAS CORPORATION and ATLANTIA TANKER CORPORATION	STATE OF LOUISIANA
	PARISH OF ST. JAMES

ANSWER OF ATLANTIA TANKER CORPORATION

NOW INTO COURT, through undersigned counsel, comes defendant, Atlantia Tanker Corporation ("Atlantia") and responds, on information and belief, to the Petition of Youn Hae U (styled as Hae Woo Youn) as follows:

FIRST DEFENSE

The Petitioner fails to state a claim or cause of action upon which relief can be granted.

SECOND DEFENSE

This Court lacks subject matter jurisdiction.

THIRD DEFENSE

1.

The allegations contained in Article 1 of the Petition are questions of law that require no answer by Atlantia; however, in the event answer is deemed necessary then

the allegations contained in Article 1 of the Petition are denied.

2.

The allegations contained in Article 2(A) of the Petition are not directed to and require no answer by Atlantia.

The allegation contained in Article 2(B) of the Petition that Atlantia is a foreign corporation organized under the laws of the State of New York with its principal place of business in the State of New York is denied. It is admitted, however, that Atlantia is a foreign corporation occasionally doing business within the State of Louisiana. The allegation in Article 2(B) that Atlantia is subject to this Court's jurisdiction pursuant to the provisions of the Louisiana Long Arm Statute is a question of law that requires no answer by Atlantia; however, should answer be deemed necessary then that allegation is denied.

3.

The allegation contained in Article 3 of the Petition that at all pertinent times plaintiff was employed by Atlantia aboard the M/V ATLANTIA, a vessel owned by Atlantia, is admitted. The remaining allegations contained in Article 3 of the Petition are denied.

4.

The allegation contained in Article 4 of the Petition that on or about May 23, 1989, plaintiff suffered personal injuries aboard the M/V ATLANTIA while the vessel was

located at St. James Parish, Louisiana, is admitted. The remaining allegations contained in Article 4 of the Petition are denied.

5.

The allegations contained in Article 5 of the Petition are denied.

6.

The allegations contained in Article 6 of the Petition are denied.

7.

The allegations contained in Article 7 of the Petition are denied.

8.

The allegation contained in Article 8 of the Petition that plaintiff was hospitalized in Baton Ruge [sic] is admitted. The remaining allegations contained in Article 8 of the Petition are denied.

9.

The allegations contained in Article 9 of the Petition are denied.

FOURTH DEFENSE

AND NOW FURTHER answering, Atlantia avers in the alternative that the damages alleged by plaintiff, if any exist, which is specifically denied, were caused solely by the fault and negligence of plaintiff or others from whom Atlantia has no responsibility which precludes and bars plaintiff's recovery herein.

FIFTH DEFENSE

AND NOW FURTHER answering, Atlantia avers in the alternative that, if it is found that plaintiff suffered damages as a result of the negligence of anyone for whom Atlantia could or might be responsible, all of which is specifically denied, the damages of plaintiff were also caused by and/or contributed and/or aggravated by plaintiff's own negligence and Atlantia is entitled to have any award or recovery mitigated and reduced accordingly.

SIXTH DEFENSE

The rights and remedies of plaintiff, if any, are governed exclusively by the terms of his employment contract with Atlantia and by Korean law.

WHEREFORE, the premises considered, Atlantia Tanker Corporation prays: (1) for trial by jury; (2) That this its Answer be deemed good and sufficient and that after due proceedings had there be judgment in its favor

and against plaintiff, dismissing the Petition at plaintiff's cost and for all general and equitable relief.

Respectfully submitted,

/s/ Clayton G. Ramsey
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JAMES B. KEMP, JR. (7779)
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Telephone: 504-566-1311

and

PHELPS, DUNBAR, MARKS, CLAVERIE & SIMS
Attorneys for Atlantia Tanker Corporation

04161

CERTIFICATE

I certify that a copy of the foregoing pleading has been forwarded to all counsel of record by depositing same in the United States mail postage prepaid this 2 day of Oct. 1989.

/s/ Clayton G. Ramsey

APPENDIX G

HAE WOO YOUN	:	NUMBER 19,400
	:	DIVISION "C"
VERSUS	:	
MARITIME OVERSEAS CORPORATION AND ATLANTIA TANKER CORPORATION	:	23RD JUDICIAL DISTRICT COURT
	:	PARISH OF ST. JAMES
	:	STATE OF LOUISIANA
FILED: Oct. 11, 1989	:	/s/ Rita M. Cooper DEPUTY CLERK

AMENDED PETITION FOR DAMAGES

The amended petition for damages of HAE WOO YOUN, plaintiff in the above numbered and entitled proceeding, respectfully requests leave of Court to amend the original petition herein in the following respects:

I. By amending paragraph 1 of the original petition so as to read as follows:

"1.

> This is a case under the Jones Act, 46 U.S.C. § 6888, and the General Maritime law, brought in this Honorable Court under the Savings to Suitors Clause, 28 U.S.C. § 1333. Plaintiff specifically designates this suit as an admiralty or general maritime claim for purposes of eliminating any right to trial by jury in accordance with article 1732(6) of the Louisiana Code of Civil Procedure."

WHEREFORE, plaintiff prays for leave of Court to file this amended petition, and reiterates the prayer for relief set forth in the original petition.

Attorneys for Plaintiff:

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ORDER

LET the foregoing amended petition be filed as prayed for.

ORDER RENDERED AND SIGNED, at Gonzales, Louisiana, on this 11 day of Oct., 1989.

/s/ John L. Goldsmith
JUDGE 23RD JUDICIAL
DISTRICT COURT

SERVICE INFORMATION:

SERVE Defendant, MARITIME OVERSEAS CORPORATION, through its attorney of record, Clayton G. Ramsey, Texaco Center, 400 Poydras Street, New Orleans, Louisiana, 70130.

SERVE Defendant, ATLANTIA TANKER CORPORATION, through its attorney of record, Clayton G. Ramsey, Texaco Center, 400 Poydras Street, New Orleans, Louisiana, 70130.

APPENDIX H

HAE WOO YOUN	:	NUMBER 19,400
VERSUS	:	DIVISION "C"
MARITIME OVERSEAS CORPORATION AND ATLANTIA TANKER CORPORATION	:	23RD JUDICIAL DISTRICT COURT PARISH OF ST. JAMES STATE OF LOUISIANA
FILED: Oct. 11, 1989	:	/s/ Rita M. Cooper DEPUTY CLERK

MOTION TO STRIKE DEMAND FOR JURY TRIAL MADE BY DEFENDANT ATLANTIA TANKER CORPORATION

Now into Court, through undersigned counsel, comes HAE WOO YOUN, plaintiff in the above numbered and entitled proceeding, and moves the Court for issuance of a Rule to Show Cause directed to defendant, ATLANTIA TANKER CORPORATION, ordering said defendant to show cause why its demand for jury trial should not be ordered stricken, all for the reasons more particularly set forth in the accompanying memorandum in support of this motion.

Attorneys for Plaintiff:

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Of counsel:

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Telephone: 504 647-2881

ORDER

Considering the foregoing motion:

IT IS ORDERED that defendant, Atlantia Tanker Corporation, show cause on the 26th day of OCTOBER, 1989, at 9:00 o'clock A.M., why its demand for jury trial should not be ordered stricken.

ORDER RENDERED AND SIGNED, at GONZALES, Louisiana, on this 11th day of OCTOBER, 1989.

/s/ John L. Goldsmith
JUDGE, 23RD JUDICIAL
DISTRICT COURT

SERVICE INFORMATION:

SERVE Defendant, ATLANTIA TANKER CORPORATION, through its attorney of record, Clayton G. Ramsey, Texaco Center, 400 Poydras Street, New Orleans, Louisiana, 70130.

HAE WOO YOUN	:	NUMBER 19,400
VERSUS	:	DIVISION "C"
MARITIME OVERSEAS CORPORATION AND ATLANTIA TANKER CORPORATION	:	23RD JUDICIAL DISTRICT COURT
	:	PARISH OF ST. JAMES
	:	STATE OF LOUISIANA
FILED: Oct. 11, 1989	:	/s/ Rita M. Cooper Deputy Clerk

MEMORANDUM IN SUPPORT OF MOTION TO STRIKE DEMAND FOR JURY TRIAL

May It Please The Court:

Louisiana Code of Civil Procedure article 1732 was of course amended in 1988 by adding the proviso designated sub-part (6), so as to read in pertinent part as follows:

"A trial by jury shall not be available in

* * *

"(6) A suit on an admiralty or general maritime claim under federal law that is brought in state court under a federal 'saving to suitors' clause, if the plaintiff has designated that suit as an admiralty or general maritime claim."

Plaintiff in his original petition stated that this was a Jones Act and a General Maritime claim. Plaintiff, of course, never asked for a trial by jury. Without in any way conceding that it would at all be necessary, plaintiff has now sought leave of Court to file an amended petition, specifically designating the case as one for which

jury trial would not be proper in accordance with Louisiana Code of Civil Procedure art. 1732(6).

The obvious intent of this legislation was to leave it strictly within the option of plaintiff as to whether or not a Jones Act case or a General Maritime law case filed in state court under the Saving to Suitors Clause, 28 U.S.C. § 1333, would or would not be tried by jury.

There is also no question as to retroactive applicability of this particular statute, since this cause of action and the filing of this suit both arose subsequent to the effective date of the 1988 amendment to article 1732.

For the foregoing reasons plaintiff respectfully submits that the demand for jury trial made by defendant, Atlantia Tanker Corporation in its answer, should be ordered stricken.

Respectfully submitted

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SERVICE INFORMATION:

SERVE Defendant, ATLANTIA TANKER CORPORATION, through its attorney of record, Clayton G. Ramsey, Texaco Center, 400 Poydras Street, New Orleans, Louisiana, 70130.

APPENDIX I

* * *

HAE WOO YOUN

[2314] two or three times a month, is that right?

A Yes.

Q And when you got out of the Navy, you felt like you pretty much knew how to use winches, is that correct?

A Yes. When I was in the Navy, it was operated by the electrical system; however, when I began working for the MOC, I have been using the winch for fifteen years, so I am confident of my operation.

Q And the winches, again, that you used while you worked for MOC from 1975 to the date of your accident were similar to the one on the Atlantia, right?

A Yes, almost similar.

Q Now, when you started out with MOC, you were a sailor, is that right?

A Yes.

Q Your job included assisting the boatswain use [sic] winches, correct?

A Sometimes, when I was a sailor, by the direction of the boatswain, I sometimes operated the winch.

Q When you were promoted to quartermaster in [2315] 1978, you were still involved with assisting in using the winches?

A Yes.

Q And when you were promoted to pump man in 1981, your job still required you to assist in using the winches?

A Yes.

Q And you were promoted to boatswain in October of 1986, correct?

A Yes.

Q That required that you assist the chief officer or the chief mate doing anything on the deck, right?

A Yes.

Q In fact, as boatswain you frequently supervised the use of the winch?

A Yes.

Q In fact, after your promotion to boatswain, it was really only you that supervised the use of the winch, is that correct?

A Yes.

Q And when you were supervising the use of the winch, of course, you told other people working under you what to do, right?

[2316] A Yes.

Q And you would correct those people if they did something wrong, right?

A Yes.

Q And, Mr. Youn, by the time that you were promoted to boatswain, you felt confident that you knew everything you needed to know to operate a winch, didn't you?

A Yes.

Q In fact, on the Atlantia, Mr. Youn, you were really the most experienced person on board in using winches, is that right?

A Yes.

Q And you, in fact, taught the quartermasters and sailors on the Atlantia how to use winches after you were promoted to boatswain, correct.?

A Yes.

Q And you, as the boatswain, were responsible for overseeing the safe use of the winch, isn't that right?

A Yes.

Q And while you were a boatswain on the Atlantia you operated the winch six or [2317] seven times a month, is that right?

A Yes.

Q And on the date of your accident the sailors that were helping you were Mr. Heu and Quartermaster Choi, is that right?

A Yes.

Q And you taught Mr. Heu and Mr. Choi how to use the winch on the Atlantia, right?

A Yes.

Q And, Mr. Youn, I think there's been a little bit of confusion on this because of one of the questions asked, but isn't it true you, in fact, started serving on the Atlantia in 1987 in August?

MR. DUE': He served twice, counsel. Two sets.

MR. KAISER: That's where I'm getting confused.

MR. DUE': I mean, the question I asked him was the last time he was on board.

MR. KAISER: I understand. That's where I think the

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[2329] long times, is it?

A Yes, you're right. It didn't take a long time.

Q Okay. Now, ultimately, the boom, when it fell, ultimately wound up falling down, according to your drawing, to the position which is marked as C on Exhibit D-2, is that right? If not, correct it.

A You mean to the point by C?

Q That's right. In other words, let me clear up the record just a little bit. There's a point marked as C, it goes from A to B to C. Is this position C where the boom ultimately wound up after it fell?

A Yes, you're right.

MR. KAISER: Your Honor, we would offer into evidence Exhibit D-2.

MR. DUE': No objection.

JUDGE: So ordered. D-2

BY MR. KAISER:

Q Now, Mr. Youn, there was another procedure for fastening the line to the winch head, wasn't there?

[2330] A Yes.

Q And that procedure was to connect the eye at the end of the lead wire to the winch head and wrap up all the excess lead wire on the winch, correct?

A Yes.

Q And you were aware that that procedure for fastening the line to the winch existed when your accident occurred, correct?

A Yes, I knew.

Q And, in fact, you had used the procedure where you connect all the line to the winch head and wrap up all the excess line before, hadn't you?

A Yes, I did.

Q But the procedure that's shown on Exhibit D-1, which is the procedure where you don't connect the end of the lead wire to the winch, is a faster way to operate the boom, isn't it?

A It's faster, and at the same time, it's easier to use.

Q Mr. Youn, but the procedure whereby you connect the lead wire to the winch and reel

* * *

[2344] Let's not stop. Go.

BY MR. KAISER:

Q Mr. Youn, at your deposition, you remember me asking you about the safety, the relative safety of the two methods of winding up line on the winch, right?

A They didn't ask him about the safety, but asked him about what ways are there.

Q Okay. Mr. Youn . . .

MR. KAISER: Let me state for the record before I ask the question that referenced in the deposition transcript are Exhibit #11, the words "Exhibit #11," quote; and, quote, "Exhibit #4." Exhibit #11 was a drawing that Mr. Youn drew showing a line attached to the winch head, and Exhibit 4 is now Defendant's Exhibit D-1.

BY MR. KAISER:

Q Mr. Youn . . .

[2345] MR. KAISER: Counsel, on page 94, line 15.

BY MR. KAISER: "Q. Okay. Mr. Youn, is there less a chance of the wire coming loose if you use the method shown on Exhibit #11 where all of the wire is wound up on the winch drum?"

And you answered, quote:

"A. You maybe say that it would be much safer, would be safer than the other way; however, under the situation, even though I did

it this way, the accident might happen."

Do you remember that?

JUDGE: Mr. Kim, he has it in writing if it would be easier for you to do your interpretation that way. You want to show him, Mr. Kaiser, the question you're talking about.

MR. KAISER: Oh, I'm sorry. Pardon me, Your Honor. For [2346] the record, I'm referring to page 94 beginning at line 15 and reading down through line 23.

MR. KIM: Okay.

(Whereupon the interpreter reads from the deposition and translates to the witness.)

BY MR. KAISER:

A It seems to be right.

Q Okay. That's what you said at the deposition, correct?

A Yes.

Q Mr. Youn, you went to a training institution in Korea called the Suwon Injon (phonetic spelling) Vocational Training School in 1990, is that right?

A Yes.

Q And that training institute started in January of 1990, and ended in June of 1990, correct?

A Yes.

Q And, in fact, you graduated from that training institute, didn't you?

A Yes.

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